Supreme Court, U.S.
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No. ____-_____

In The

Supreme Court of the United States

October Term 1993

JANINE LAMBERT, EVA BAKER and TAMI FOSTER,
Petitioners,

vs.

GENESEE HOSPITAL, FRANCIS DUPRE, Individually, and as Manager of the Duplicating Services Department of The Genesee Hospital, TOD TIMMEL, Individually, and as Materials Manager,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court reinstate the jury verdict on the retaliatory promotion claims because it was supported by substantial evidence and the plaintiffs are entitled under the Constitution to a trial by a jury?

2. Should this Court resolve the conflict among the circuits and rule that where a jury verdict is supported by substantial evidence, reversal of j.n.o.v. results in reinstating the jury verdict, not a new trial?

3. Should this Court resolve the conflict among the circuits and hold that the Equal Pay Act (EPA) retaliation section covers informal workplace complaints in addition to a formal complaint?

4. Should this Court reverse the summary judgment dismissal of some of Lambert,

Baker and Foster's (LBF) claims because the court below invaded the jury's function of weighing the evidence offered, judging credibility and determining motive?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JANINE LAMBERT, EVA BAKER and TAMI FOSTER,

Petitioners

v

GENESEE HOSPITAL, FRANCIS DUPRE, Individually and as Manager of the Duplicating Services Department of The Genesee Hospital, TOD TIMMEL, Individually and, as Materials Manager,

Respondents

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioners Janine Lambert, Eva Baker and Tami Foster (LBF) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit,

entered in the above-entitled proceedings on September 17, 1993 and modified on November 24, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit issued on September 17, 1993 is reported at ____F.3d _____ (2nd Cir. 1993) and is reprinted in the Appendix attached hereto at 1a, infra.[1] The court granted in part and denied in part LBF's Petition for Rehearing and Suggestion for Rehearing in Banc by decision filed December 9, 1993, reprinted in the Appendix at 97a, infra. The court's modified opinion is reported at 10 F.3d 46 (2nd Cir. 1993) and is reprinted in the Appendix attached hereto at 45a, infra.

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1. The "___a" citations are to the Appendix attached to this Petition. "A___" citations are to the Joint Appendix in the Circuit.

JURISDICTION

Federal jurisdiction in the trial court was invoked under 28 U.S.C. Sec 1331, 42 U.S.C. Sec. 2000(e) et seq. and 29 U.S.C. Sec. 206(d)(1), 215 and 216(b). The decision of the Court of Appeals sought to be reviewed was issued on September 17, 1993. A timely petition for rehearing was filed on October 1, 1993. The petition for rehearing was granted in part and denied in part by order of the Court of Appeals on December 9, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

PERTINENT STATUTES

LBF's claims in issue on this petition arise under the Equal Pay Act, 29 U.S.C. §206(d)(1), 29 U.S.C. §215, the Seventh Amendment to the U.S. Constitution and Title VII of the Civil Rights Act of 1964,

Sec. 2000(e)k.

Equal Pay Act, 29 U.S.C. §206(d)(1)

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor

other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

Equal Pay Act, 29 U.S.C. §§215(a)(3)

"(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person --

* * * *

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;"

United States Constitution - Seventh Amendment

Right of Trial by Jury

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

42 U.S.C. §2000(e)(k)

"The terms 'because of sex' or 'on the basis of sex' include, but are not limited to because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs,

as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion."

STATEMENT OF THE CASE

Lambert, Baker and Foster (LBF) are current or former employees of The Genesee

Hospital (Hospital)[2] who made multiple complaints of sex discrimination (favoring untrained, inexperienced and unqualified males for training and promotion opportunities to the exclusion of experienced, trained and/or qualified females), denial of equal pay for equal work and retaliation to their supervisors, to Hospital middle management, to the Hospital Employee Affairs Officer, and to the Hospi-

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2. In addition to the Hospital, LBF sued Francis "Bo" Dupre, Manager of Duplicating Service and Todd Timmel, Materials Manager. The defendants are referred to collectively in this petition as "Hospital." LBF sued Mr. Dupre for his multiple acts of discrimination/retaliation against them after the Hospital promoted him to Manager in spite of their complaints that he is an incompetent printer and was promoted to discriminate/retaliate against them. Mr. Timmel is sued because of his discrimination/retaliation against LBF in the promotion of Mr. Dupre and his multiple acts of discrimination/retaliation in placing inexperience, unqualified males in all Department jobs after the female supervisor, Terri Shiels, became seriously ill.

tal President. When all those internal efforts to remedy the discrimination/retaliation failed, they complained to the EEOC and then the federal district court. They sued under the Equal Pay Act (EPA), Title VII and the New York Human Rights law (HRL).

On the eve of trial, the district court granted summary judgment[3] to the Hospital on the claims that LBF were denied equal pay for equal work - paid less for operating the 360 press than males operating the

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3. The court erroneously held that LBF had no evidence that the work on the 360 and 385 presses is the same or similar work. LBF not only had the testimony of each plaintiff who had done the work to this effect but they had the testimony of an expert in printing, Professor Clifton Frazier of Rochester Institute of Technology (R.I.T.) that the work was the same or similar work. Professor Frazier has taught printing and has worked as a printer for 28 years. He has served as a consultant to the manufacturer of the 360 and 385 presses, A. B. Dick Co.

385 press; Foster's claim that she was discriminated against because of pregnancy when the Hospital refused to return her to her 360 printing job after maternity leave; Lambert and Baker's claims that they were denied promotion and training opportunities to the 360 press in the fall of 1983, to the 360 and 385 presses in May of 1984, to office work in May of 1984 and Ms. Lambert's claim that she was denied the 385 press job in April 1985. The court also ruled that LBF were not entitled to a jury trial on the HRL claims.

At trial of the remaining EPA substantive and retaliation claims, LBF won a jury verdict[4] that the Hospital retaliated

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4. LBF won this jury verdict even though the court excluded evidence of multiple acts of discrimination/retaliation. The court did not permit testimony and/or limited testimony of (1) Mr. Timmel favoring inexperienced males for the 360 press

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opening in the fall of 1983; (2) LBF and their witness Wolfer about discrimination in the Dietary, Processing and SPD Department; (3) LBF about Mr. Timmel's favoring inexperienced males for the openings on the 360 press, 385 press and office in May 1984; (4) the Hospital practice of permitting other persons, both male and female, to take disability or maternity leaves and return to their jobs; (5) witness Wolfer about her attempts to be transferred into the Department, including her conversation with President Hanson about the LBF complaints; (6) Baker and Foster about the October 1984 job description incident; (7) Foster about Mr. Dupre's statement to her in December 1984 that she would have had the 385 job but for her pregnancy; (8) Lambert about additional pay complaints; (9) Lambert that she was barred from applying for the 385 job in April 1985; (10) the printing requisition admissions and work samples which establish that Lambert and Foster as 360 operators were doing the most difficult printing work while being paid less; (11) Paul Shields, former Department employee, who would have testified that he received on the job training as a printer in the Department - contradicting Mr. Timmel's testimony that Mr. Dupre did the first on-the-job-training of printers; (12) Dr. Bonnie Bullough, who was prepared to testify that her analysis of available job applications in Materials Management demonstrated the Hospital used sex based steering for jobs (men steered to all male

against them by appointing the incompetent[5] Dupre to manager and denied Baker

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...Continued...

or male dominated jobs while women were steered to all female or female dominated jobs) and that she observed patterns of sex discrimination from reviewing the numbers of men and women employed in Materials Management; (13) LBF's Exhibit 369, microfilm production records which corroborated LBF's testimony of work each performed in Ms. Shiels' absence notwithstanding the court permitted the Hospital to introduce a portion of those records; (14) Mr. Dennis' hiring and continued employment notwithstanding Hospital rules requiring his termination for lying on his application; (15) most of LBF's rebuttal testimony; (16) most of LBF's additional testimony on their Title VII and HRL claims; (17) LBF corroborating events in which more than one were involved.

5. The Hospital claimed it selected Dupre for manager because he is a skilled printer. LBF's expert, Professor Frazier, testified that Mr. Dupre is anything but a skilled printer. LBF's evidence of his incompetence included Mr. Dupre's stripping the negative crooked, handling the delicate, very thin plate in the developing and plate mounting process "like a sack of potatoes" to cause kinks in the plate, mixing his fountain solution incorrectly, taking too long in the "make ready" stage, never achieving an ink and

equal pay for equal work when it paid Dupre a stipend for charge work but denied Baker extra pay for that work. The jury found for the Hospital on the Baker and Foster constructive discharge claims. The jury awarded $28,000.00 to each LBF, $991.00 to Baker on her EPA claim, and $3,000.00 to each in punitive damages[6]

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water balance, wasting paper, producing unacceptable finished printing (Hospital stationary with the printing not aligned and marred by plate kinks which printed; Hospital stationary printed with the watermark in the wrong position), inability to: change the cutter blade or adjust it; to pad correctly; to re-insert the form rollers; to instruct in the basic press functions; to design forms neatly.

6. The court found that a plaintiff is entitled to punitive damages on EPA retaliation claims, relying on Travis v. Gary Community Health Center,Inc. 921 F.2d 108 (7th Cir. 1990), cert. den. 112 S.Ct. 60 (1991). The court so instructed the jury. However, in granting j.n.o.v., the court found it incorrectly instructed the jury on this issue. The Travis holding and the jury instructions given are correct.

against Timmel, a total award of $93,991.00.

Promptly after the jury trial, the court, as required by law, granted LBF judgment on some[7] of the Title VII claims controlled by the jury verdict in LBF's favor. After taking brief further evidence, [8]the court granted judgment to the Hospital on all remaining Title VII claims. The court believed the Hospital and its witnesses; the jury believed LBF and their witnesses. LBF have always claimed they have a constitutional right to a trial by jury on their EPA and HRL claims - on all the facts underlying all

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7. LBF also claimed that the court should have granted judgment to them on the discriminatory promotion claims based on the jury verdict.

8. The court denied most of LBF's requests for further proof on the Title VII and HRL claims.

claims.

Almost a year later and notwithstanding LBF claimed that the Hospital had not preserved any of the grounds on which they moved for j.n.o.v., the court vacated the jury verdict and entered judgment for the Hospital on all claims. LBF appealed the adverse pre-trial, trial and post trial rulings to the Second Circuit.

The Circuit reversed the granting of j.n.o.v. on the Baker EPA substantive claim and ordered a new trial;[9] in its

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9. LBF claim that the Circuit should have ruled that the Hospital did not preserve its grounds for j.n.o.v. on these claims. The Circuit should have ruled that this motion was barred just as it eventually ruled the j.n.o.v. motion of the Hospital on the retaliatory promotion claims was barred. The Hospital did not comply with Rule 50(a)(2) as amended. During trial it never specified "...the judgment sought and the law and the facts on which the moving party is entitled to the judgment" which it later used in its j.n.o.v. motion.

modified opinion, held[10] j.n.o.v. on the LBF EPA retaliation verdict had been improperly granted because the grounds for the motion were not preserved but upheld dismissal of the claims holding that the EPA retaliation section covers only formal court complaints and that LBF had not proved a retaliatory motive - as a matter of law; reversed the denial of a jury trial to LBF on HRL claims and ordered a new trial; reversed judgment in favor of the defendants on the related Title VII claims and ordered a new trial; affirmed summary judgment on the other equal pay, discrimination and retaliation claims and affirmed the evidentiary rulings.

REASONS FOR GRANTING THE WRIT

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10. The court had upheld the granting of j.n.o.v. in all respects in its first opinion.

POINT I - THE JURY VERDICT ON THE RETALIATORY PROMOTION CLAIMS SHOULD BE REINSTATED BECAUSE THE COURT DISREGARDED THE SUBSTANTIAL EVIDENCE BEFORE THE JURY THAT LBF PROVED EACH ELEMENT OF THE CLAIMS - THAT THE JOB DESCRIPTION QUALIFICATIONS WERE A SHAM, THAT LBF WERE MISLED IN NOT APPLYING FOR THE OPENING BECAUSE TIMMEL LIED TO THEM ABOUT THE QUALIFICATIONS AND THE SELECTION PROCESS AND THAT THE HOSPITAL'S MOTIVE, IN PART WAS RETALIATION FOR LBF'S REPEATED DISCRIMINATION/ RETALIATION COMPLAINTS; THE COURT INVADED THE JURY'S PROVINCE BY UPHOLDING JNOV.

LBF have a constitutional right to trial by jury. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care." Dimick v. Schiedt, 293 U.S. 474, 486 (1934).

The law is settled that "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury

could have drawn inferences or conclusions or because judges feel that other results are more reasonable." Newmont Mines Ltd. v. Hanover Insurance Co., 784 F.2d 127, 133, 134 (2nd Cir. 1986), citing Tennant v. Peoria & Pekin Union Railway, 321 U.S. 29, 35 (1944). The Circuit invaded the jury's province in this case by upholding j.n.o.v.

The Circuit ignored the substantial evidence that the Hospital disregarded the job description in filling the job; the qualifications were a sham, they were overstated; they were irrelevant to the manager job; the Hospital's argument that the job description was used to select the manager is mere pretext.

The evidence was uncontroverted that Dupre did not have a primary, stated qualification for the manager job - five

to six years experience in a similar shop. Dupre admitted that his prior City School District job did not involve any pre-press work nor post-press (bindery) work. The Hospital printers on the other hand were required to do all of their own pre-press work (stripping negatives, developing plates) as well as all of the post-press (bindery) work including, for example, drilling, padding and folding. [A. 3639-42, 5512-16, 6835-36]

Timmel conceded that he knew Dupre did not have experience in pre-press operations required by the Hospital. [A. 5974-76] He simply disregarded the job description requirement, stating it was "not that important." [A. 4975]

Knowing that Dupre did not have any experience in a major skill needed for the manager job, forms design, Timmel attempt-

ed to groom[11] Dupre for the job immediately on Ms. Shiels' death. Dupre was moved to the office to learn forms design and other manager jobs even though Foster had been trained by Ms. Shiels to do the work and was in fact doing the work before her maternity leave. [A. 4952-54, 5606-08] Timmel attempted to have Dupre trained in forms design by paying for an outside

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11. LBF were not offered any of the advantages of any of these on the job or outside training opportunities. [A. 5609-10] Differential treatment among employees based on sex is a strong inference of discrimination or retaliation. EEOC v. Brown & Root, Inc., 683 F.2d 338 (5th Cir. 1982); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Rhode v. K.O. Steel Castings, Inc., 649 F.2d 317 (5th Cir. 1981); EEOC v. Chas. Schaefer Sons, Inc., 703 F.Supp. 1138 (D.N.J. 1988); Bocage v. Litton Systems, Inc., 702 F.Supp. 846 (D. Utah 1988); EEOC Decision No. 71-288, 9/17/70, CCH EEOC Decisions (1983) ¶6413. The Circuit ignored this and other evidence of discriminatory/retaliatory motive.

course; Dupre asked Foster to train him in this work. [A. 4928-30, 5608-09, 6522] Timmel arranged for Dupre to take supervisory courses prior to naming him as manager; these courses were offered only to incumbent first level and middle Hospital managers. [A. 4925-28]

None of Timmel's grooming efforts of Dupre were successful. Dupre admitted that well after the time he was made manager, he could still not do more difficult forms design jobs. Lambert, Foster and the other printer returned work to him for correction repeatedly. Dupre never came close to meeting Timmel's self-defined criteria for the manager job, a skilled printer who could lead, teach, train, repair equipment and answer customer printing questions. [A. 3375-76, 3596-97, 4064-69, 4070-74, 4218-22, 5610-14,

7865-71, 8056-57] Timmel disregarded Dupre's declining print shop evaluation scores (given by Shiels) before appointing Dupre manager; Timmel admitted that one of the drops in performance was "significant." [A. 4905-08]

Not only did the substantial evidence demonstrate that Timmel disregarded the stated job qualifications but the substantial evidence before the jury demonstrated that Timmel made up new manager qualifications. He imposed a "supervisory experience" qualification and he down played the stated qualification of familiarity with the microfilm process, attempting to tailor the job requirements for Dupre. [A. 4728, 4770-71]

Experts called by LBF and the Hospital testified about appropriate qualifications for the Hospital manager job. LBF con-

tended that the stated requirement of five-six years prior experience in a similar shop was an overstated requirement, not necessary for the manager job. Neither expert asserted that the length of time, five-six years, was a necessary requirement for the position.[12] Professor Frazier on behalf of LBF testified the presses are easy to learn and relatively simple; they are used for training and in high school printing programs. [A. 4130-31]

Hospital counsel made LBF's expert,

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12. The trier of fact may rely on expert testimony in both disparate treatment and disparate impact cases to determine whether a qualification is a business necessity or non-pretextual explanation for the denial of a promotion. Davis v. Richmond, F. & P. R. Co., 803 F.2d 1322 (4th Cir. 1986) (the requirement of prior train service to be selected as an apprentice engineer was of doubtful value and a pretext for discrimination).

Professor Frazier, her own witness. Professor Frazier testified that Dupre had none of the desired "manager" qualities the Hospital sought. [A. 4245-61] Nor did the testimony of the Hospital expert on manager qualities suggest that the Dupre met the criteria. Mr. Tack listed personality (defined as getting along well with co-workers), good work habits, punctuality and an understanding of the process. [A. 5383] There was ample evidence that none of Dupre's co-workers respected him or his abilities; they told Timmel.[13]

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13. The uncontroverted testimony was that one co-worker, Kent Johnson, convulsed in laughter on learning of the appointment of Dupre as manager. Another co-worker, Robert Weisschadel, sat in stunned silence; the next day he asked to transfer to another job; the request was granted. Mr. Johnson was so contemptuous of Mr. Dupre after he was appointed manager that the Hospital terminated Johnson for insubordination after he mockingly challenged Mr. Dupre about one of his "new rules" in

[A. 3830-31, 3395-96, 3444] Mr. Tack also admitted that Dupre had bad work habits (trying to print while seated in a chair with his eyes closed). [A. 5385]

The district court in its summary judgment ruling held that LBF could demonstrate that Dupre was so lacking in skills as to be a person without qualifications for the job. [A. 2265-66] LBF not only proved this by substantial evidence but they proved that the stated job qualifications were pretextual, each, LBF, had the skills actually needed and each was excused from applying by Timmel's lying to them about the qualifications and selec-

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...Continued...

front of other employees.

tion process.[14] [A. 3443-50, 3857-59, 4321-22, 4784, 4786]

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14. Timmel told Lambert and Baker in separate meetings each requested with him to explain the problems in the department resulting from Dupre serving as charge person that he would hire a new department head who had the posted, stated qualifications for the job; the person would come from outside the Hospital. Lambert and Baker testified that each relied on Timmel's promise; Lambert testified Mr. Timmel told the Department "...he was making an extensive outside search for a replacement for Terri Shiels. He was going to fill the position with somebody who met the qualifications." In an individual follow up meeting with Mr. Timmel, Ms. Lambert testified she "...told him that I seriously hoped that he was really and truly going to make an outside search for a Manager of the duplicating services, that it hadn't worked out with Bo as charge person. There were hard feelings in the department because he was picking on people and singling them out, the women, and that I hoped that he really would make an outside search to get somebody that was qualified so that we could have a fresh start." Ms. Lambert further testified that she "...believed that he would find somebody that met the qualifications from the outside and fill the position."

These are issues of great importance. In International Brotherhood of Teamsters v. United States, 431 U.S. 324, 365 (1977), this court held that an employee's failure to apply for a position may be excused. "...[A] person claiming discrimination based on sex concerning a promotion is not under all circumstances precluded from recovery, in spite of her failure to apply for the position, if she convinces the jury that she failed to apply for the position because of something the employer did or said that indicated that the application on her part would be futile." (Emphasis added.) The district court instructed the jury accordingly. [A. 6137-38] LBF convinced the jury as they were entitled to do under the Constitution. The evidence is uncontroverted that Timmel lied to LBF

about the qualifications for the job and the selection process. This court should not permit this well established rule to be disregarded.

Fundamental to the EPA is the rule of law that employer job descriptions or employer stated qualifications for jobs are not dispositive of equal pay claims; the actual work that is performed in the job and the actual skills needed to perform the job control. Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974); Brennan v. Prince William Hospital, 503 F.2d 282, 286 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975); Equal Pay Act Interpretations, 29 C.F.R. §1620.13(e) (1986). This court should not allow the undermining of the statute nor the substantial case law that pretextual job qualifications are evidence of discrimina-

tion/ retaliation in both disparate treatment and disparate impact cases. See, for example, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Davis v. Richmond, F. & P. R. Co., 803 F.2d 1322 (4th Cir. 1986); Domingo v. New England Fish Company, 727 F.2d 1429, 1437 (9th Cir. 1983).

POINT II - THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AND RULE THAT WHERE A JURY VERDICT IS SUPPORTED BY SUBSTANTIAL EVIDENCE, REVERSAL OF J.N.O.V. RESULTS IN REINSTATING THE JURY VERDICT, NOT A NEW TRIAL.

The Circuit found the district court's granting j.n.o.v. on Baker's substantive EPA claims to be erroneous but held it was powerless to reinstate the jury verdict even where such jury verdict is supported by substantial evidence, as in this case. Circuit Judge Walker summarized the relevant authority in the Second Circuit, in other circuits and in treatises in his concurring opinion in Dunlap-McCuller v.

Riese Organization, 980 F.2d 153, 160, 161 (2nd Cir. 1992), cert. denied ___U.S.___(1993), 114 S.Ct. 290.

This court should hold that a district court order granting or denying a motion for new trial on the grounds that a verdict is against the weight of the evidence is reviewable. The contrary Second Circuit rule has been criticized by Wright & Miller. The Second Circuit rule conflicts with the rule of stringent review of district court orders vacating jury verdicts on evidentiary grounds "'to protect a party's right to a jury trial.'" Id. at 160.

This is an extremely important issue - a party has a constitutional right to a trial by jury. As Judge Walker succinctly summarized at page 161 of Dunlap-McCuller, quoting Redd v. City of Phoenix City, 934

F.2d 1211, 1214 (11th Cir. 1991), "When there is some support for a jury's verdict, it is irrelevant what we or the district court would have concluded."

The Circuit found substantial support for Baker's substantive EPA verdict. The verdict must be reinstated. There was substantial support for LBF's retaliatory denial of manager claims; the jury verdict must be reinstated.

POINT III - THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AND HOLD THAT THE EPA RETALIATION SECTION COVERS INFORMAL WORKPLACE COMPLAINTS IN ADDITION TO A FORMAL COMPLAINT; THE COURT SHOULD FOLLOW THE INTERPRETATION OF THE EPA BY THE OTHER CIRCUITS AND THE EEOC, REVERSING THE SECOND CIRCUIT.

In a first impression holding, 72a-79a, the Circuit narrowly construes[15] the EPA

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15. The Circuit misstates the record when it asserts that LBF only complained to Dupre or Timmel. The testimony was uncontroverted that LBF complained to the

retaliation section as not encompassing "...complaints made to a supervisor" but only covering formal complaints.[16] The court rejected its prior rulings holding that complaints to supervisors are covered by the Title VII retaliation section,

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...Continued...

Hospital Employee Affairs Officer and to the President. Nor did LBF merely complain that Baker's pay was "unfair." Lambert testified she told President Hanson that the Hospital denying Baker charge pay, denying Baker the opportunity to apply for the charge job which she had been doing without pay and the placing of "totally inexperienced men" in positions even after she and the other women had complained and expressed interest in the job is "sex discrimination." She further testified that President Hanson promised to investigate the sex discrimination complaints they were making. [A. 3452-3455]

16. This issue was neither raised nor briefed by the parties. The trial court, with the concurrence of counsel for all parties, instructed the jury that retaliation for informal work place complaints violates the EPA. [A. 2849, 6131-32] The jury found retaliation following these instructions.

rejected the holdings of all other circuits that the EPA retaliation section covers complaints to supervisors, EEOC v. Romeo Community School, 976 F.2d 985 (6th Cir. 1992); Love v. RE/MAX of America, Inc., 738 F.2d 383 (10th Cir. 1984); EEOC v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 1989); Crowley v. Pace Suburban Bus Div., 938 F.2d 797, 798 n. 3 (7th Cir. 1991), and rejected the EEOC interpretation that the EPA retaliation section applies to unofficial assertions of rights through complaints at work. EEOC Compliance Manual, 704:0030.

The Circuit rejected the law that it may not disregard the EEOC's interpretation of the statute Congress charged it to enforce and that a court must give deference to the EEOC interpretation. Local No. 93, International Association of Firefighters

v. City of Cleveland, 106 S. Ct. 3063, 3073 (1986); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Swartz v. Gordon, 761 F.2d 864 (2nd Cir. 1985); Horn v. Duke Homes, 755 F.2d 599, 604 n. 6 (7th Cir. 1985). So long as the EEOC view is rational, the court cannot substitute its judgment for that of the agency. Chemical Manufacturers Ass'n v. National Resource Defense Counsel, 470 U.S. 116, 125 (1985). But the Circuit labeled the statute clear; it held it was free to disregard the EEOC interpretation.

The Circuit overlooked the plain language and intended meaning of 29 U.S.C. §215(a)(3). Retaliation is forbidden where an "employee has filed any complaint". There is no requirement that this complaint be written or that the complaint be "formal" as it has ruled.

This is a question of exceptional importance. Were the court's ruling to stand, most of the protection currently afforded employees in the work place would be eliminated. Lay persons, not schooled in statutory nuances, would continue to try to address their claims to their supervisors and/or up the chain of command; a fair number would encounter retaliation but have no protection. Congress did not intend this result. This court should not permit such a result through an unintended reading of the statute by the Circuit. It is in the interest of employers, employees and the court for complaints to be aired in the work place and resolved. Should the employee encounter retaliation as a result of the work place complaints, Congress intended that the employee would be protected.

POINT IV - THE COURT DISREGARDED THE APPLICATION OF THIS COURT'S DECISION IN ST. MARY'S HONOR CENTER V. HICKS TO THIS CASE; SUMMARY JUDGMENT COULD NOT HAVE BEEN GRANTED ON OTHER EPA AND HRL CLAIMS; THESE WERE CLAIMS WHICH THE JURY WAS ENTITLED TO CONSIDER; IT IS THE JURY'S FUNCTION IN THESE CIRCUMSTANCES TO WEIGH THE EVIDENCE OFFERED, JUDGE CREDIBILITY AND DETERMINE MOTIVE.

In St. Mary's Honor Center v. Hicks, ___U.S.___, 61 LW 4782, 4785 (1993), this court concluded that it is up to the "appropriate fact finder" to determine "according to proper procedures that the employer has unlawfully discriminated." The court reiterated the long standing rule that plaintiff's prima facie case creates an inference of discrimination which may be rebutted by a defendant with evidence of non-discriminatory reasons. The case then moves into the "credibility assessment" stage, "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the

defendant intentionally discriminated against [him]'..." Hicks, supra at 4784. Rejection of the defendants' proffered reasons "...will permit the trier of fact to infer the ultimate fact of intentional discrimination." Id.

The jury is the appropriate fact finder on LBF's EPA 360/385 press claims, the HRL discriminatory denial of 360 and 385 press work in 1983, 1984 and 1985 and office work in 1984 and the HRL denial of 360 job on return from pregnancy leave in July 1984 for Foster. The district court wrongly required LBF to show more than a prima facie case on summary judgment. It required proof of discriminatory intent and evidence that defendants' explanation is unworthy credence. [A. 2257-58, 2270] The court in Hicks ruled that the prima facie case establishes the inference of

discrimination; after the defendant offers its a non-discriminatory reason, the case moves to the "credibility assessment" stage. On summary judgment, the district court is barred from making credibility determinations and weighing the evidence or drawing inferences from the evidence - these are jury jobs in a case where a plaintiff has a right to a trial by jury as LBF do on their EPA and HRL claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The Circuit overlooked the evidence LBF had that the 360/385 press jobs are substantially equal. Professor Frazier who has taught press work at RIT for years and has himself printed for years was prepared to testify at trial, as he had stated in his report that the work is substantially

equal.[17] [A. 312-319] LBF would have testified to this effect from actual experience.

The Circuit disregarded the evidence that after Ms. Shiels became ill and later died, LBF were systematically denied all training and/or job opportunities. Dupre was given the charge person job instead of Lambert because he had a wife and children to support, according to LBF proof. [A. 3395-96] The untrained and inexperi-

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17. The court's reference to Dr. Bullough's report does not suggest the contrary. The trial court excluded this report from any part of the trial. The Circuit affirmed this ruling. Additionally, Dr. Bullough looked only at Hospital job descriptions in her analysis. There are slight differences in the job descriptions of the 360 and 385 press operators. However, as noted above, what an employer puts in a job description does not control the issue of liability under the EPA. What counts is the work actually done and the skills actually required.

enced Johnson[18] was placed on the 360

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18. The Circuit incorrectly asserts that male press operators were more experienced than LBF. Johnson held a series of temporary jobs with the Hospital while he was in college studying geology. He is the nephew of a Hospital vice president. When Johnson could not find full time work after obtaining his geology degree, Timmel accommodated him by placing him in the Department on a temporary basis and then changing his status to permanent so he could obtain Hospital benefits. Johnson had no training or experience on any press anywhere before Timmel gave him opportunities on both the 360 and 385 presses.

Similarly, Weisschadel had no training or experience on any press anywhere before Timmel gave him opportunities on the 360 press. Weisschadel had worked in another area of the Hospital before being brought into the Department to assist in microfilming. The testimony was he was poor at microfilming.

The testimony is uncontroverted that Mr. Dennis whom the Hospital hired when it refused to permit Lambert to apply for the 385 job in 1985 lied about prior 385 experience on his application to obtain the job at the Hospital. He in fact had never operated a 385 press. The truth is that both Lambert and Dennis had only 360 press experience. Notwithstanding that the Hospital policy required immediate termination for any falsification of an

press in September of 1983 in spite of LBF complaints. [A. 3406-08] Timmel continued to deny Baker's requests to be paid for microfilm charge work even though Timmel was paying Dupre for that work [A. 3837]; in spite of LBF's complaints,

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application, it continued to employ Mr. Dennis after his multiple lies were admitted in his deposition in this case. The Hospital knew when it continued Dennis' employment that he was mistreating Ms. Lambert at work by telling other workers it was her fault that he had a brief suspension (for his admitting lying on his application during his deposition). Coworkers shunned Ms. Lambert because of Mr. Dennis' accusations; the Hospital did nothing to correct the false information that Ms. Lambert had caused Mr. Dennis' suspension. The intensity of Mr. Dennis' hostility toward Ms. Lambert was demonstrated by his quitting his job the day after the announcement of the jury verdict in favor of LBF.

Mr. Dupre continued to make the working environment miserable for Ms. Lambert by forbidding her assisting the new microfilm clerk with questions except over break or lunch hour, requiring her to do extra work, changing her work or making it more difficult.

Timmel groomed Dupre for the manager job while he was serving as charge person by sending him to in house managerial courses for incumbent managers [A. 4925-28]; when Foster left on maternity leave, Timmel brought Dupre into the office to learn the office work she had been doing; Dupre asked Foster to train him in the office work; Timmel sent Dupre to an outside course to learn a major portion of the manager job, forms design. [A. 4928-30, 5608-09, 6522] The inexperienced Johnson was given the chance to learn the 385 press; the inexperienced Weisschadel was given the chance to operate the 360 press. [A. 3428-29] After Baker and Foster left the Hospital in April 1985, Dupre/Timmel barred Lambert from the 385 job although she was already doing the same or similar

work as a proficient 360 operator.[19] [A. 3584, 6128-29]

The claims of discriminatory denial of transfers, training and promotion are claims the jury was entitled to hear just as they were entitled to judge credibility and weigh the evidence on the 360/385 press claims. Summary judgment is hardly ever appropriate in an employment discrimination/retaliation case where motive and intent are in issue, these are jury questions. Lipsett v. University of Puerto Rico, 864 F.2d 881, 895 (1st Cir. 1988). "[T]he fact finder's disbelief of the

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19. The court stated that because a woman had served as manager of the print shop, discrimination is not suggested. The evidence is uncontroverted that Shiels became manager before Timmel or Dupre had any role in the Department. [A. 4668-69] LBF proof established that the continual favoring of inexperienced and unqualified males began with Timmel/Dupre.

reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." Hicks, supra at 4784.

The Circuit disregarded the evidence in support of Foster's claim of discriminatory denial of the 360 job on return from maternity leave. LBF had uncontroverted evidence that the Hospital disregarded its leave policy. The Hospital held jobs open for men and women with other disabilities. [A. 2142-44, 2161-71, 3439-40] The district court misstated the law by suggesting that because other women have had jobs held open for them the inference of discrimination is rebutted. [A. 2275] It is the law that an employer must treat pregnancy disability like other disabilities.

If it holds jobs open for persons with other disabilities, it must hold the job open for the female disabled during pregnancy. EEOC Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. 1604 Appendix.

CONCLUSION

For the reasons set forth above, petitioners respectfully submit that the Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

/s/Emmelyn Logan-Baldwin
Attorney for Petitioners

Dated: March 3, 1994

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 597 - August Term, 1992

(Argued: December 1, 1992)
(Decided: September 17, 1993)

Docket No. 92-7570

JANINE LAMBERT, EVA BAKER, and TAMI FOSTER,

Plaintiffs-Appellants,

-v-

GENESEE HOSPITAL, FRANCIS DUPRE, Individually and as Manager of the Duplicating Services Department of The Genesee Hospital, TOD TIMMEL, Individually, and as Materials Manager,

Defendants-Appellees.

Before:

LUMBARD, WINTER, and WALKER,

Circuit Judges

Appeal by plaintiffs from judgments of the United States District Court for the

Western District of New York (David G. Larimer, Judge), challenging the court's dismissal on summary judgment of certain of plaintiffs' Title VII, Equal Pay Act, and New York Human Rights Law claims, and its grant of judgment notwithstanding the verdict and a new trial in the alternative on other claims; its ruling that plaintiffs were not entitled to a jury trial on the Title VII and Human Rights Law claims; its exclusion of certain evidence at trial; and its ruling that plaintiffs were not entitled to punitive damages.

Affirmed in part, reversed in part, vacated in part and remanded.

EMMELYN LOGAN-BALDWIN, Rochester, N.Y., for Plaintiffs-Appellants.

SUSAN S. ROBFOGEL, Rochester, New York (Marion Blankopf, Nixon, Hargrave, Devans & Doyle, Rochester, New York, of counsel), for Defendants-Appellees.

WALKER, Circuit Judge:

This is an action brought by three employees of the Duplicating Services Department of the Genesee Hospital (the "Hospital") against the Hospital, their supervisor Tod Timmel, and Francis Dupre, a printer in the Department who was elevated to manager. Plaintiffs allege discrimination based on sex and retaliation for complaining about the alleged discriminatory practices, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"); the Fair Labor Standards Act, 29 U.S.C. §201 et seq. (the "FLSA"), as modified by the Equal Pay Act of 1963, 29 U.S.C. §206(d) et seq. (the "EPA"); and the New York State Human Rights Law, N.Y. Exec. Law §291 et seq. (the "Human Rights Law" or "HRL").

Plaintiffs appeal on a variety of grounds from a judgment of the United States District Court for the Western District of New York (David G. Larimer, Judge) of April 28, 1992 and an amended judgment dated May 22, 1992. The plaintiffs challenge rulings made in decisions and orders of the district court dated April 4, 1991, July 18, 1991, August 13, 1991, April 28, 1992 and May 22, 1992, contained in the foregoing judgments. Plaintiffs contend that the district court erred in dismissing a number of their claims on summary judgment; in denying them a jury trial on their Title VII and HRL claims; in a number of its evidentiary rulings; in granting judgment notwithstanding the verdict (j.n.o.v.) on certain claims and in the alternative a new trial; and in ruling that plaintiffs could not receive punitive damages under the Equal Pay Act.

We agree with plaintiffs that they were entitled to a jury trial on their Human Rights Law claims. We also agree with plaintiffs that the district court erred in granting j.n.o.v. on plaintiff Eva Baker's claim that she was denied equal pay for equal work, but affirm the district court's grant of a new trial on that issue The remainder of plaintiffs' claims are without merit, and we affirm the district court as to them.

BACKGROUND

The Hospitals' Duplicating Services Department (the "Department") provides it with microfilm and printing services. The Department was formally divided into a microfilm area and a printing area in March 1983. It normally had a staff of six: two microfilm clerks, two printers who operate offset presses, one printing clerk, and a manager. Plaintiff Eva Baker

transferred to the Department from another area of the Hospital in 1980 to become a microfilm clerk. In 1982, plaintiff Tami Foster, who had been a driver with the Hospital's motor pool, transferred to the Department to help out with various clerical functions. Both Baker and Foster left the Hospital in 1985 due to the alleged discriminatory acts of the defendants. Plaintiff Janine Lambert joined the hospital staff as a microfilm clerk in February 1982 and remained employed by the Department throughout the course of this action.

In March 1983, Foster operated the model "360" offset printing press and defendant Francis Dupre ran the model "385" press, which paid more than the 360 position. Also at that time, Lambert transferred to print clerk, opening up a microfilm clerk position, which Robert Weisschadel filled. The Department's manager at that time was

Terri Shiels, a woman who had been manager of the Department since its creation in 1976, and before that had been manager of the Department's predecessor, known simply as the print shop. From March through May of 1982, Shiels, who had cancer, was out of the office on medical leave. When she went on medical leave again in August or September, 1983, her supervisor, Materials Manager Tod Timmel, transferred another Hospital employee, Kent Johnson, into the Department to assist in her absence.

In September 1983, Foster became pregnant and moved from the 360 press to the Department's office without a change in pay. The parties agree that this transfer stemmed from concern about the potentially harmful effects of the solvents used on the press, but disagree as to whether Foster or the Hospital initiated it. Timmel then assigned Johnson to Foster's

former position on the 360 press, and announced that he would appoint one of the printing area employees to be a "charge person," who would be an informal supervisor of the printing employees. Baker, who was in the microfilm area and claimed to be acting in a supervisory capacity there, complained to Timmel about not being permitted to apply for the position. Lambert and Dupre applied for the charge-person position, which Timmel gave to Dupre. When Dupre received a corresponding raise, Baker and Lambert complained to Timmel, and also to Ron Good in the Hospital's employee-affairs department, that since Baker was in effect also a charge person in the microfilm area, she was entitled to the same salary as Dupre. Lambert also complained to Good that Timmel chose Dupre for the charge-person position over her because

Dupre was male.

In May 1984, Foster went on maternity leave. As a result, Dupre moved into the office, maintaining his 385 job title and salary, Johnson moved from the 360 press to the 385 press (receiving a raise six months later), and Weisschadel took over the 360. That same month, Terri Shiels died. The Hospital subsequently advertised the manager position in the Rochester newspapers, and posted the position within the Hospital. These listings stated that the position required, inter alia, five to six years of printing experience.

In July 1984, Foster returned from maternity leave and requested reassignment to the 360 press, where she had worked before she became pregnant and moved into the office. Instead, Timmel assigned her to the microfilm clerk position, but paid

her the same salary and benefits she had received as a 360 operator.

In September 1984, Timmel picked Dupre, who had more than eight years of printing experience, to manage the Department. Plaintiffs Lambert, Baker, and Foster, none of whom applied for the position or had the requisite five to six years of printing experience, complained to Paul Hanson, the Hospital's president, that the selection of Dupre as manager was based on sex, and that other instances of sex discrimination had occurred in the Department. Baker threatened to quit. Robert Weisschadel also complained about the selection of Dupre as manager. On October 26, 1984, plaintiffs filed charges with the Equal Employment Opportunity Commission (the "EEOC"). Then, on April 12, 1985, Baker and Foster resigned and on April 17, 1986, filed additional charges

with the EEOC.

In July 1986, plaintiffs filed the instant action. The parties filed cross-motions for summary judgment, and the district court granted judgment in favor of the defendants on a number of their EPA and Title VII claims: the Title VII claims of sex discrimination in the various transfers among the printer and clerk positions; Lambert and Foster's Equal Pay Act claims that the 360 and 385 printer positions were substantially equal and deserving of equal pay; Foster's claim that she was a victim of discrimination based on her pregnancy; and Foster's claim of discrimination in the appointment of Dupre to charge person. The district court permitted plaintiffs to go to trial on their constructive discharge claims and their claims of other instances of retaliatory harassment for filing the

first EEOC charge; their claims that Dupre's promotion to manager was in retaliation for their complaints to their supervisors of denial of equal pay and other complaints of discrimination, and that the promotion also was sex discrimination; the claims of Lambert and Baker that they were discriminatorily denied the charge-person position; and the claims of Baker and Foster that their positions were equal to Dupre's charge-person position.

On May 21, 1991, after a five-week trial, the jury found for all three plaintiffs on their FLSA claims that the Dupre promotion was retaliation for making EPA complaints, and found for Baker on her EPA claim that she was denied equal pay for her charge-person responsibilities in the microfilm area. However, the jury found for the defendants on all three plaintiffs' EPA

claims of retaliation through constructive discharge and other incidents of retaliatory harassment, and Foster's claim that she was denied equal pay.

In a decision and order issued on July 18 1991, the district court set forth the binding effect that the jury's verdict would have on the court's Title VII and HRL judgments and made various evidentiary rulings. The court held that the jury's findings of EPA retaliation and denial of equal pay to Baker compelled the court to find violations of Title VII based on the same conduct. However, as to the EPA claims the jury rejected, the court held that it was free to find Title VII violations based on the same conduct. The court also granted summary judgment for the defendants on plaintiffs' Title VII and HRL claims based on the disparate pay of the 360 and 385 operators, as it had

earlier on the EPA claims arising from the same facts.

The district court took further evidence after the close of the jury trial, and issued its judgment on the Title VII and HRL claims on August 13, 1991. Based on the corresponding jury finding of EPA violations, the district court entered judgment for plaintiffs on their Title VII and HRL claims for retaliatory promotion of Dupre to manager and for defendants' denial of equal pay to Baker due to her sex. The court also found that Baker and Lambert's claims of discrimination in the promotion of Dupre to charge person were time-barred. The court found for the defendants on the remaining EPA and Title VII claims.

Defendants moved for j.n.o.v. or, in the alternative, for a new trial on the issues on which the plaintiffs had prevailed: the

retaliatory promotion of Dupre to manager and the denial of equal pay to Baker. On April 28, 1992, the district court granted j.n.o.v. on these claims and entered judgment. On May 22, 1992, the district court amended the judgment to order a new trial in the alternative.

This appeal followed.

DISCUSSION

I. Jury-Trial Issues

A. Human Rights Law Claims

In its April 4, 1991 decision, the district court held that there was no right to a jury trial on the Human Rights Law claims, since the court considered these claims to be equitable in nature. The court also exercised its discretion to take supplemental jurisdiction over the Human Rights Law claims pursuant to 28 U.S.C. §1367, although we note in passing that the district court incorrectly

invoked United Mine Workers v. Gibbs, 383 U.S. 715 (1966), instead of §1367, which codified Gibbs, as would have been the correct procedure.

After the district court issued its decision, we ruled that Human Rights Law claims are legal and that the right to a jury therefore attaches. Song v. Ives Labs., Inc., 957 F.2d 1041, 1047-48 (2d Cir. 1992). Since the court in Song applied this rule to the action before it, the rule must be applied in all subsequent decisions, see James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991), and plaintiffs are entitled to a jury trial on their HRL claims.

B. Title VII

Plaintiffs argue that they also were entitled to a jury trial on their Title VII claims, pursuant to amendments to Title VII that were part of the Civil

Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (the "Act"). We have held that the jury-trial provisions of the Act do not apply retroactively. See Wisdom v. Intrepid Sea-Air Space Museum, 993 F.2d 5, 7 (2d Cir. 1993); Postema v. National League of Professional Baseball Clubs, 998 F.2d 60, 61-61 (2d Cir. 1993). Our decision in Butts v. City of New York Department of Housing Preservation & Development, 990 F.2d 1397 (2d Cir. 1993), left open the possibility that a different retroactivity analysis might apply to actions pending on appeal at the time the Act was passed. See id. at 1410-11. In the present action, although the bench trial on the Title VII issues preceded the November 21, 1991 effective date of the Act, the district court did not enter judgment until April 28, 1992, so the action was not pending on appeal when the

Act became effective. Wisdom therefore controls, and the district court properly denied the plaintiffs a jury trial on their Title VII claims.

II. Timeliness of the Charge-Person Claims

All three plaintiffs claim that the appointment of Dupre as charge person of the printing area constituted discrimination against them in violation of Title VII. The district court granted summary judgment for defendants on Foster's charge-person claim in its April 4, 1991 decision and order, but denied summary judgment on Baker's and Lambert's claims, since they presented triable issues of fact. Although the discriminatory acts claimed by Baker and Lambert occurred more than 300 days before the plaintiffs filed their EEOC charge in October 1984 and ordinarily would be time-barred under 42 U.S.C. §2000e-5(e),

see Gomes v. Avco Corp., 964 F.2d 1330, 1332-33 (2d Cir. 1992), the court allowed the claims to proceed to trial to give plaintiffs an opportunity to prove that the charge-person discrimination was part of a "continuing violation." See id. at 1333. After hearing evidence on the issue, the court ruled in its August 13, 1991 bench trial decision that plaintiffs had failed to prove the existence of a continuing violation.

Under the continuing violation exception to the Title VII limitations period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone. Cook v. Pan Am. World Airways, Inc., 771 F.2d 635,

646 (2d Cir. 1985), cert. denied, 474 U.S. 1109 (1986).

The continuing violation exception applies to cases involving specific discriminatory policies or mechanisms such as discriminatory seniority lists, Cook, 771 F.2d at 646, or discriminatorily employment tests, Association Against Discrimination in Employment, Inc. v. Bridgeport, 647 F.2d 256, 274-75 (2d Cir. 1981), cert. denied, 455 U.S. 988 (1982). However, multiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation. See Stoller v. Marsh, 682 F.2d 971, 975 (D.C. Cir. 1982) (no continuing violation where a plaintiff does not allege an "unlawful program of discrimination" but merely alleges "specific, perhaps unrelated instances" of discrimination) (quoting

Milton v. Weinberger, 645 F.2d 1070, 1076 (D.C. Cir. 1981)), cert. denied, 460 U.S. 1037 (1983); Samuel v. Merrill Lynch Pierce Fenner & Smith, 771 F.Supp. 47, 49 (S.D.N.Y. 1991). Since plaintiffs failed to produce evidence of any such policy or mechanism here, the charge-person claims were properly dismissed as time-barred.

III. Judgment Notwithstanding the Verdict

Plaintiffs first argue that the district court erred in granting j.n.o.v. under Rule 50(b) because, they claim, defendants did not move for a directed verdict on the claims for which the court granted j.n.o.v.

A j.n.o.v. motion under Fed.R. Civ. P. 50(b) is in reality a renewal of a motion for a directed verdict, and cannot assert new grounds for relief. Meriwether v. Coughlin, 879 F.2d 1037, 1044 (2d Cir. 1989). However, here the defendants asked

for a directed verdict on the grounds that "as a matter of law the plaintiffs have failed to prove any of the claims they are entitled to prove in this phase of the trial." This is sufficient to preserve a j.n.o.v. motion challenging the jury's verdict as to any of the EPA claims. See Mosley v. Cia.Mar.Adra S.A., 362 F.2d 118, 121 (2d Cir.), cert. denied, 385 U.S. 933 (1966).

A. Retaliation Under the Equal Pay Act

Plaintiffs challenge the district court's grant of j.n.o.v. pursuant to Fed. R. Civ. P. 50(b) on their claim under §215(a)(3) of FLSA that Dupre's promotion to manager was in retaliation for their complaints about being denied equal pay.

It is well established in this circuit that a j.n.o.v. motion may only be granted where there is "such a complete absence of evidence supporting the verdict that the

jury's finding could only have been the result o[f] sheer surmise and conjecture," or if the evidence is "so overwhelming that reasonable and fair minded persons could only have reached the opposite result." Sorlucco v. New York City Police Dep't, 971 F.2d 864, 871 (2d Cir. 1992) (quoting Stubbs v. Dudley, 849 F.2d 83, 85 (2d Cir. 1988), cert. denied, 489 U.S. 1034 (1989)).

Plaintiffs' theory is that they were denied the manager position, and that Dupre was appointed, in retaliation for their complaints to their supervisors that they were not receiving equal pay for jobs that were substantially equal. The Hospital answers that Dupre got the promotion because he was the best applicant who met the job qualifications, and that plaintiffs were not considered because they did not apply, and, in any

event, did not meet the posted requirements for the job.

Retaliation, whether under FLSA or Title VII, is evaluated using the analytical framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 876 (2d Cir. 1988). A plaintiff must, as a threshold matter, establish a prima facie violation. See McDonnell Douglas, 411 U.S. at 802. To establish this, a plaintiff must show (1) that the plaintiff engaged in a protected activity; (2) that the employer was aware of this activity; (3) that the employer has taken an employment action disadvantaging the plaintiff; and (4) that a retaliatory motive played a part in the challenged employment action. Sumner v. United States Postal Serv., 899 F.2d 203, 208-209 (2d Cir. 1990); Grant v. Bethlehem Steel

Corp., 622 F.2d 43, 46 (2d Cir. 1980). While plaintiffs have alleged and sufficiently proven an employment action disadvantaging them by proving Dupre's promotion, they have failed to put forth any evidence that they were engaged in a protected activity or that a retaliatory motive lay behind Dupre's promotion.

Title VII broadly provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. §2000e-3(a). The phrase "opposed any practice" encompasses an individual's complaints to supervisors regardless of

whether she also files an EEOC charge. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 65 (2d Cir. 1992).

In contrast, FLSA's anti-retaliation provision makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. §215(a)(3). The EPA is an amendment to the FLSA and is codified under the same chapter; thus retaliation for filing EPA complaints falls under §215(a)(3). The plain language of this provision limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not

encompass complaints made to a supervisor. See EEOC v. Romeo Community Sch., 976 F.2d 985, 990 (6th Cir. 1992) (Surheinrich, J., dissenting) (noting that §215(3) on its face prohibits retaliation based on "three expressly enumerated types of conduct," in contrast to the much broader retaliation protection afforded by Title VII). We note that a number of our sister circuits have held to the contrary. See Romeo Community Sch., 976 F.2d at 989-90 (holding that plaintiff's complaint that employer was "breaking some sort of law" by paying her lower wages was sufficient to constitute filing of Equal Pay Act action for purposes of §215(a)(3)); EEOC v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 1989) (noting that while complaints to supervisors were not acts "explicitly listed in the FLSA's anti-retaliation provision," reading such acts to be within

the provision is merited since it would further the remedial purpose of the FLSA); Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984) (holding that §215(a)(3) "applies to the unofficial assertion of rights through complaints at work"); see also Crowley v. Pace Suburban Bus Div., 938 F.2d 797, 798 n.3 (7th Cir. 1991) (noting that Section 215(a)(3) has been "construed broadly").

Plaintiffs allege not that they filed any complaint or charge prior to Dupre's promotion, but only that they complained to Timmel that Baker should receive the same salary that Dupre received as charge person of the printing area, since her responsibilities in the microfilm area were substantially equivalent. We also note that they merely complained that it was "not fair" that Baker did not receive charge-person pay for her duties, without

stating that sex was the reason for the disparity. Under these circumstances, no cause of action for Equal Pay Act retaliation will lie.

Our decision in Brock v. Casey Truck Sales, Inc., 839 F.2d 872 (2d Cir. 1988), is easily distinguishable. In that case, the company fired workers who had the temerity to claim back pay that the company had agreed with the Labor Department to pay following an investigation that had arisen out of a worker's complaint to the Labor Department that workers were being denied compensation at overtime rates. We held that §215(a)(3)'s anti-retaliation provision applied, since "[p]rotection against discrimination for instituting FLSA proceedings would be worthless if an employee could be fired for declining to give up the benefits he is due under the

Act." Id. at 879. In contrast, the acts for which the Hospital allegedly retaliated were neither the filing of a claim nor acts, such as accepting a back pay award, that grew out of the filing of claims. They are simply oral complaints to a supervisor that an employee was being paid less than the complainants thought she should have been.

Plaintiffs also failed to proffer evidence that could support a finding that a retaliatory motive played a part in the Hospital's promoting Dupre rather than one of the plaintiffs. The job qualifications for the manager position - five to six years printing experience, design and typesetting experience, and familiarity with microfilm process-had been the same since 1977, before any of the plaintiffs worked in the Department. Although plaintiffs produced evidence at trial

sufficient to support a conclusion that Dupre's printing skills were lacking, there is no evidence that he failed to meet the qualifications set forth in the job description, or that the plaintiffs met them. See Canino v. EEOC, 707 F.2d 468, 471 (11th Cir. 1983) (no prima facie case of retaliatory failure to promote where plaintiff did not meet qualifications of position sought). Nor is there evidence showing that the job description was tailored specifically to select Dupre or pass over the plaintiffs. See Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721, 728-29 (8th Cir. 1982); Hartman v. Wick, 600 F.Supp. 361, 363-64 (D.D.C. 1984). To the contrary, the job qualifications were established long before any of the plaintiffs worked in the Department. In sum, the record is devoid of any direct or circumstantial evidence

that could show that a retaliatory motive underlay Dupre's promotion to manager.

Since the evidence was insufficient to establish a prima facie case of retaliation, the district court properly granted defendants' j.n.o.v. motion on the jury's EPA retaliation verdict. Plaintiffs' related argument that the district court erred in holding that punitive damages were unavailable to them under the EPA is moot.

B. Title VII and Human Rights Law Claims

Plaintiffs also claimed that the promotion of Dupre to manager constituted disparate treatment based on sex in violation of Title VII and the New York Human Rights Law, as well as retaliation under those statutes. The district court found for the defendant on these claims. Because plaintiffs were entitled to a jury trial on their HRL claims, the usual

course would be to vacate the district court's judgment on both the Title VII and HRL claims arising from Dupre's promotion to manager. We follow this course where a litigant is wrongfully denied a jury trial on factual issues and the court also decided overlapping factual issues in a separate claim properly tried to the bench; otherwise, the collateral-estoppel effect of the district judge's factual determinations would undermine the litigant's jury-trial rights. See Lytle v. Household Mfg., Inc., 494 U.S. 545, 552-53 (1990). However, here there is no need to remand the retaliation and sex-discrimination Title VII and HRL claims arising from Dupre's promotion to manager since, as a matter of law, plaintiffs fail to satisfy threshold elements of their claims.

As noted above, evidence was wholly absent to prove that plaintiffs met the

job qualifications of the manager's position or that the job description was tailored to favor Dupre over them or men over women generally. Indeed, we note that before Dupre, the manager's position was held by a woman-Terri Shiels-from the creation of the Department in 1976 until her death in 1984. In the absence of evidence that could make out a threshold showing that plaintiffs were qualified for the position, there is no need to try these issues to a jury. See McDonnell Douglas, 411 U.S. at 802; Ashker v. International Business Machs. Corp., 168 A.D.2d 724, 725, 563 N.Y.S.2d 572, 573 (3d Dep't 1990) (in unlawful discharge case brought under the HRL, employee must prove qualification for the job from which she was discharged); see also State Div. of Human Rights ex rel. Carey v. Human Rights Comm'r of Syracuse, 79 A.D.2d 181, 185,

436 N.Y.S.2d 502, 505 (4th Dep't 1981) (upholding retaliation award under HRL where plaintiff was qualified for position and employer failed to hire her because of prior filing of complaint).

C. Baker's Equal Pay Act Claim

The district court erred, however, in granting defendants' motion for j.n.o.v. on Baker's Equal Pay Act claim that her position in the microfilm area from February 1982 to September 1984 was equal to Dupre's charge-person position, since the jury had before it sufficient evidence to support a verdict in Baker's favor.

To establish a claim under the Equal Pay Act, a plaintiff need not prove that her job is identical to a higher-paid position, but only must demonstrate that the two positions are "substantially equal." Hodgson v. Corning Glass Works, 474 F.2d 226, 234 (2d Cir. 1973), aff'd,

417 U.S. 188 (1974); Koster v. Chase Manhattan Bank, N.A., 609 F.Supp. 1191, 1193 (S.D.N.Y. 1985). However, where jobs are merely comparable, an action under the Equal Pay Act will not lie. Hodgson, 474 F.2d at 230-31; Koster, 609 F.Supp. at 1193.

There was sufficient evidence before the jury for it to conclude that the formalized charge-person position in the printing area occupied by Dupre and Baker's position in the microfilm area were both quasi-supervisory positions intended to fill in gaps in management responsibilities left by Shiels's frequent medical leaves. The jury's decision that these positions were substantially equivalent, and not merely of comparable value, had a reasonable basis in the evidence. We therefore reverse the district court's grant of j.n.o.v.

However, the district court, pursuant to Rule 50(c) granted a new trial in the alternative on this claim. A grant of a new trial for insufficiency of the evidence is not reviewable in this circuit. Dunlap-McCuller v. Riese Org., 980 F.2d 153, 157-58 (2d Cir. 1992), petition for cert. filed, No. 92-8206, March 18, 1993. We therefore remand this claim for a new trial.

IV. Summary Judgment

Finally, plaintiffs challenge the grant of summary judgment in favor of the defendants on four groups of claims.

First, plaintiffs assert error in the dismissal of the Equal Pay Act claims of Lambert and Foster that they were paid less for operating the 360 press than the male operators received for operating the 385 press. However, plaintiffs' own expert's data gave the 385 position a "job

worth" score nine-percent higher than the 360 press position. It also was undisputed that the 385 operators had substantially more experience operating printing presses. The district court correctly determined that there could be no violation of the Equal Pay Act as a matter of law since plaintiffs proposed no facts that would show that the positions were substantially equal.

Foster contends that the district court erred in dismissing her Title VII claim that the Hospital refused to assign her to the 360 printer on her return from maternity leave (although the Hospital did pay her the salary and benefits of a 360 operator). Title VII requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same as other employees who have temporary disabilities. 42 U.S.C. §2000e(k). The

Hospital's leave of absence policy states that "the Hospital is unable to guarantee return to one's original position following a Leave of Absence (except for short-term Military Leaves as defined by Law). . . ." Plaintiffs have offered no evidence that the Hospital departed from this policy in a discriminatory manner, or that the policy itself was designed to discriminate against pregnant women, either of which could have raised an inference of discrimination against Foster based on her pregnancy. We find no error in the district court's grant of summary judgment for the defendants on this claim.

The district court also properly granted summary judgment for the defendants on plaintiffs' Title VII and HRL claims of discrimination in the transfer of employees to the 360 and 385 presses, since the plaintiffs failed to produce any

evidence to support an inference of discriminatory motive in the assignment of employees to the various printer positions.

Finally, the district court properly granted summary judgment on Foster's claim that she was denied the printing charge-person position because of her sex, since she never applied for the position. See McDonnell Douglas, 411 U.S. at 802.

Plaintiffs make a host of objections to various evidentiary rulings by the district court, all of which we find to be without merit.

CONCLUSION

We reverse the district court's grant of j.n.o.v. on Baker's Equal Pay Act claim that she was denied equal pay for the microfilm charge-person duties and remand it to the district court for a new trial. We affirm the district court's

determination that the plaintiffs were not entitled to a jury trial on their Title VII claims, but reverse the court' determination that they were not entitled to a jury trial on their HRL claims. We therefore vacate and remand those HRL claims for which defendants were not entitled to judgment as a matter of law: Baker's claim that she was paid less than Dupre for her charge-person duties in the microfilm area; Foster's claim that she was paid less than Dupre when she worked in the office during her pregnancy; the claims of Baker and Foster for constructive discharge; and the claims of all three plaintiffs for miscellaneous acts of retaliatory harassment. We also vacate the district court's judgments on the Title VII claims arising from the same facts, to prevent the district court's judgments from the bench from having

preclusive effect on the HRL claims, and remand them to the district court. Also, while the district court properly found Baker's and Lambert's Title VII claims of discrimination in Dupre's promotion to charge person to be time-barred, since a three-year statute of limitations applies to HRL claims, see Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 307, 461 N.Y.S.2d 232, 239 , 448 N.E.2d 86, 93 (1983), their charge-person claims under the HRL appear, on the present record, to be timely; thus the district court's judgment for the defendants on this issue is vacated and remanded to the district court for further proceedings.

The district court entered judgment for the defendants on the remainder of the plaintiffs' claims on summary judgment or j.n.o.v., or after deciding the claims from the bench. All of these claims

either were properly decided as a matter of law by the district court, or could have been so decided had the district court not decided them from the bench. We therefore affirm the district court's entry of judgment for the following claims: the Title VII and HRL claims of discrimination in transfers among the various printer and clerk positions of all three defendants; the EPA, Title VII, and HRL claims of Lambert and Foster that they were paid less for operating the 360 press than men were for the 385; Foster's claim under Title VII and the HRL that she was discriminated against in her assignment upon return from maternity leave; Foster's claim of discrimination in violation of Title VII and the HRL in Dupre's promotion to charge person; and the claims under the EPA, Title VII, and the HRL that Dupre's promotion to manager constituted

retaliation and sex discrimination.

The EPA claims for which the jury found for the defendants are not challenged on this appeal. The district court's evidentiary rulings are affirmed. The parties shall bear their own costs.

[AMENDED OPINION]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 597 - August Term, 1992

(Argued: December 1, 1992)
(Decided: September 17, 1993)
Amended Opinion Filed: November 24, 1993

Docket No. 92-7570

JANINE LAMBERT, EVA BAKER, and TAMI FOSTER,

Plaintiffs-Appellants,

-v-

GENESEE HOSPITAL, FRANCIS DUPRE, Individually and as Manager of the Duplicating Services Department of The Genesee Hospital, TOD TIMMEL, Individually, and as Materials Manager,

Defendants-Appellees.

Before:

LUMBARD, WINTER, and WALKER,

Circuit Judges

Appeal by plaintiffs from judgments of the United States District Court for the

Western District of New York (David G. Larimer, Judge), challenging the court's dismissal on summary judgment of certain of plaintiffs' Title VII, Equal Pay Act, and New York Human Rights Law claims, and its grant of judgment notwithstanding the verdict and a new trial in the alternative on other claims; its ruling that plaintiffs were not entitled to a jury trial on the Title VII and Human Rights Law claims; its exclusion of certain evidence at trial; and its ruling that plaintiffs were not entitled to punitive damages.

Affirmed in part, reversed in part, vacated in part and remanded.

EMMELYN LOGAN-BALDWIN, Rochester, New York, for Plaintiffs-Appellants.

SUSAN S. ROBFOGEL, Rochester, New York (Marion Blankopf, Nixon, Hargrave, Devans & Doyle, Rochester, New York, of counsel), for Defendants-Appellees.

WALKER, Circuit Judge:

This is an action brought by three employees of the Duplicating Services Department of the Genesee Hospital (the "Hospital") against the Hospital, their supervisor Tod Timmel, and Francis Dupre, a printer in the Department who was elevated to manager. Plaintiffs allege discrimination based on sex and retaliation for complaining about the alleged discriminatory practices, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"); the Fair Labor Standards Act, 29 U.S.C. §201 et seq. (the "FLSA"), as modified by the Equal Pay Act of 1963, 29 U.S.C. §206(d) et seq. (the "EPA"); and the New York State Human Rights Law, N.Y. Exec. Law §291 et seq. (the "Human Rights Law" or "HRL").

Plaintiffs appeal on a variety of grounds from a judgment of the United States District Court for the Western District of New York (David G. Larimer, Judge) of April 28, 1992 and an amended judgment dated May 22, 1992. The plaintiffs challenge rulings made in decisions and orders of the district court dated April 4, 1991, July 18, 1991, August 13, 1991, April 28, 1992 and May 22, 1992, contained in the foregoing judgments. Plaintiffs contend that the district court erred in dismissing a number of their claims on summary judgment; in denying them a jury trial on their Title VII and HRL claims; in a number of its evidentiary rulings; in granting judgment notwithstanding the verdict (j.n.o.v.) on certain claims and in the alternative a new trial; and in ruling that plaintiffs could not receive punitive damages under the Equal Pay Act.

We agree with plaintiffs that they were entitled to a jury trial on their Human Rights Law claims. We also agree with plaintiffs that the district court erred in granting j.n.o.v. on plaintiff Eva Baker's claim that she was denied equal pay for equal work, but affirm the district court's grant of a new trial on that issue. Further, we agree with the plaintiffs that the defendants are procedurally barred from raising grounds in their j.n.o.v. motion different from those raised in their directed verdict motion; however, we affirm the judgment for defendants on the EPA retaliation claims because plaintiffs as a matter of law failed to establish a retaliation claim under the EPA. The remainder of plaintiffs' claims are without merit, and we affirm the district court as to them.

BACKGROUND

The Hospitals' Duplicating Services Department (the "Department") provides it with microfilm and printing services. The Department was formally divided into a microfilm area and a printing area in March 1983. It normally had a staff of six: two microfilm clerks, two printers who operate offset presses, one printing clerk, and a manager. Plaintiff Eva Baker transferred to the Department from another area of the Hospital in 1980 to become a microfilm clerk. In 1982, plaintiff Tami Foster, who had been a driver with the Hospital's motor pool, transferred to the Department to help out with various clerical functions. Both Baker and Foster left the Hospital in 1985 due to the alleged discriminatory acts of the defendants. Plaintiff Janine Lambert joined the hospital staff as a microfilm clerk in February 1982 and remained employed by the Depart-

ment throughout the course of this action.

In March 1983, Foster operated the model "360" offset printing press and defendant Francis Dupre ran the model "385" press, which paid more than the 360 position. Also at that time, Lambert transferred to print clerk, opening up a microfilm clerk position, which Robert Weisschadel filled. The Department's manager at that time was Terri Shiels, a woman who had been manager of the Department since its creation in 1976, and before that had been manager of the Department's predecessor, known simply as the print shop. From March through May of 1982, Shiels, who had cancer, was out of the office on medical leave. When she went on medical leave again in August or September, 1983, her supervisor, Materials Manager Tod Timmel, transferred another Hospital employee, Kent Johnson, into the Department to assist in her absence.

In September 1983, Foster became pregnant and moved from the 360 press to the Department's office without a change in pay. The parties agree that this transfer stemmed from concern about the potentially harmful effects of the solvents used on the press, but disagree as to whether Foster or the Hospital initiated it. Timmel then assigned Johnson to Foster's former position on the 360 press, and announced that he would appoint one of the printing area employees to be a "charge person," who would be an informal supervisor of the printing employees. Baker, who was in the microfilm area and claimed to be acting in a supervisory capacity there, complained to Timmel about not being permitted to apply for the position. Lambert and Dupre applied for the charge-person position, which Timmel gave to Dupre. When Dupre received a

corresponding raise, Baker and Lambert complained to Timmel, and also to Ron Good in the Hospital's employee-affairs department, that since Baker was in effect also a charge person in the microfilm area, she was entitled to the same salary as Dupre. Lambert also complained to Good that Timmel chose Dupre for the charge-person position over her because Dupre was male.

In May 1984, Foster went on maternity leave. As a result, Dupre moved into the office, maintaining his 385 job title and salary, Johnson moved from the 360 press to the 385 press (receiving a raise six months later), and Weisschadel took over the 360. That same month, Terri Shiels died. The Hospital subsequently advertised the manager position in the Rochester newspapers, and posted the position within the Hospital. These

listings stated that the position required, inter alia, five to six years of printing experience.

In July 1984, Foster returned from maternity leave and requested reassignment to the 360 press, where she had worked before she became pregnant and moved into the office. Instead, Timmel assigned her to the microfilm clerk position, but paid her the same salary and benefits she had received as a 360 operator.

In September 1984, Timmel picked Dupre, who had more than eight years of printing experience, to manage the Department. Plaintiffs Lambert, Baker, and Foster, none of whom applied for the position or had the requisite five to six years of printing experience, complained to Paul Hanson, the Hospital's president, that the selection of Dupre as manager was based on sex, and that other instances of sex

discrimination had occurred in the Department. Baker threatened to quit. Robert Weisschadel also complained about the selection of Dupre as manager. On October 26, 1984, plaintiffs filed charges with the Equal Employment Opportunity Commission (the "EEOC"). Then, on April 12, 1985, Baker and Foster resigned and on April 17, 1986, filed additional charges with the EEOC.

In July 1986, plaintiffs filed the instant action. The parties filed cross-motions for summary judgment, and the district court granted judgment in favor of the defendants on a number of their EPA and Title VII claims: the Title VII claims of sex discrimination in the various transfers among the printer and clerk positions; Lambert and Foster's Equal Pay Act claims that the 360 and 385 printer positions were substantially equal and

deserving of equal pay; Foster's claim that she was a victim of discrimination based on her pregnancy; and Foster's claim of discrimination in the appointment of Dupre to charge person. The district court permitted plaintiffs to go to trial on their constructive discharge claims and their claims of other instances of retaliatory harassment for filing the first EEOC charge; their claims that Dupre's promotion to manager was in retaliation for their complaints to their supervisors of denial of equal pay and other complaints of discrimination, and that the promotion also was sex discrimination; the claims of Lambert and Baker that they were discriminatorily denied the charge-person position; and the claims of Baker and Foster that their positions were equal to Dupre's charge-person position.

On May 21, 1991, after a five-week trial, the jury found for all three plaintiffs on their FLSA claims that the Dupre promotion to manager was retaliation for making EPA complaints, and found for Baker on her EPA claim that she was denied equal pay for her charge-person responsibilities in the microfilm area. However, the jury found for the defendants on all three plaintiffs' EPA claims of retaliation through constructive discharge and other incidents of retaliatory harassment, and Foster's claim that she was denied equal pay.

In a decision and order issued on July 18 1991, the district court set forth the binding effect that the jury's verdict would have on the court's Title VII and HRL judgments and made various evidentiary rulings. The court held that the jury's findings of EPA retaliation and denial of equal pay to Baker compelled the court to

find violations of Title VII based on the same conduct. However, as to the EPA claims the jury rejected, the court held that it was free to find Title VII violations based on the same conduct. The court also granted summary judgment for the defendants on plaintiffs' Title VII and HRL claims based on the disparate pay of the 360 and 385 operators, as it had earlier on the EPA claims arising from the same facts.

The district court took further evidence after the close of the jury trial, and issued its judgment on the Title VII and HRL claims on August 13, 1991. Based on the corresponding jury finding of EPA violations, the district court entered judgment for plaintiffs on their Title VII and HRL claims for retaliatory promotion of Dupre to manager and for defendants' denial of equal pay to Baker due to her

sex. The court also found that Baker and Lambert's claims of discrimination in the promotion of Dupre to charge person were time-barred. The court found for the defendants on the remaining EPA and Title VII claims.

Defendants moved for j.n.o.v. or, in the alternative, for a new trial on the issues on which the plaintiffs had prevailed: the retaliatory promotion of Dupre to manager and the denial of equal pay to Baker. On April 28, 1992, the district court granted j.n.o.v. on these claims and entered judgment. On May 22, 1992, the district court amended the judgment to order a new trial in the alternative.

This appeal followed.

DISCUSSION

I. Jury-Trial Issues

A. Human Rights Law Claims

In its April 4, 1991 decision, the dis-

trict court held that there was no right to a jury trial on the Human Rights Law claims, since the court considered these claims to be equitable in nature. The court also exercised its discretion to take supplemental jurisdiction over the Human Rights Law claims pursuant to United Mine Workers v. Gibbs, 383 U.S. 715 (1966). We note in passing that 28 U.S.C. §1367, which codified Gibbs, only applies to claims commenced after December 1, 1990, and thus was inapplicable in this case commenced in 1986.

After the district court issued its decision, we ruled that Human Rights Law claims are legal and that the right to a jury therefore attaches. Song v. Ives Labs., Inc., 957 F.2d 1041, 1047-48 (2d Cir. 1992). Since the court in Song applied this rule to the action before it, the rule must be applied in all subsequent

decisions, see James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991), and plaintiffs are entitled to a jury trial on their HRL claims.

B. Title VII

Plaintiffs argue that they also were entitled to a jury trial on their Title VII claims, pursuant to amendments to Title VII that were part of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (the "Act"). We have held that the jury-trial provisions of the Act do not apply retroactively. See Wisdom v. Intrepid Sea-Air Space Museum, 993 F.2d 5, 7 (2d Cir. 1993); Postema v. National League of Professional Baseball Clubs, 998 F.2d 60, 61-62 (2d Cir. 1993). Our decision in Butts v. City of New York Department of Housing Preservation & Development, 990 F.2d 1397 (2d Cir. 1993), left open the possibility that a different

retroactivity analysis might apply to actions pending on appeal at the time the Act was passed. See id. at 1410-11. In the present action, although the bench trial on the Title VII issues preceded the November 21, 1991 effective date of the Act, the district court did not enter judgment until April 28, 1992, so the action was not pending on appeal when the Act became effective. Wisdom therefore controls, and the district court properly denied the plaintiffs a jury trial on their Title VII claims.

II. Timeliness of the Charge-Person Claims

All three plaintiffs claim that the appointment of Dupre as charge person of the printing area constituted discrimination against them in violation of Title VII. The district court granted summary judgment for defendants on Foster's charge-person claim in its April

4, 1991 decision and order, but denied summary judgment on Baker's and Lambert's claims, since they presented triable issues of fact. Although the discriminatory acts claimed by Baker and Lambert occurred more than 300 days before the plaintiffs filed their EEOC charge in October 1984 and ordinarily would be time-barred under 42 U.S.C. §2000e-5(e), see Gomes v. Avco Corp., 964 F.2d 1330, 1332-33 (2d Cir. 1992), the court allowed the claims to proceed to trial to give plaintiffs an opportunity to prove that the charge-person discrimination was part of a "continuing violation." See id. at 1333. After hearing evidence on the issue, the court ruled in its August 13, 1991 bench trial decision that plaintiffs had failed to prove the existence of a continuing violation.

Under the continuing violation exception

to the Title VII limitations period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone. Cook v. Pan Am. World Airways, Inc., 771 F.2d 635, 646 (2d Cir. 1985), cert. denied, 474 U.S. 1109 (1986).

The continuing violation exception applies to cases involving specific discriminatory practices or mechanisms such as discriminatory seniority lists, Cook, 771 F.2d at 646, or discriminatorily employment tests, Association Against Discrimination in Employment, Inc. v. Bridgeport, 647 F.2d 256, 274-75 (2d Cir. 1981), cert. denied, 455 U.S. 988 (1982). However, multiple

incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation. See Stoller v. Marsh, 682 F.2d 971, 975 (D.C. Cir. 1982) (no continuing violation where a plaintiff does not allege an "unlawful program of discrimination" but merely alleges "specific, perhaps unrelated instances" of discrimination) (quoting Milton v. Weinberger, 645 F.2d 1070, 1076 (D.C. Cir. 1981)), cert. denied, 460 U.S. 1037 (1983); Samuel v. Merrill Lynch Pierce Fenner & Smith, 771 F.Supp. 47, 49 (S.D.N.Y. 1991). Since plaintiffs failed to produce evidence of any such policy or mechanism here, the charge-person claims were properly dismissed as time-barred.

III. Judgment Notwithstanding the Verdict

A. Equal Pay Act Claims

Plaintiffs first argue that the district

court erred in granting defendants' j.n.o.v. motion under Fed. R. Civ. P. Rule 50(b) because defendants did not move for a directed verdict on the claims for which the court granted j.n.o.v. At the close of the plaintiffs' case, the defendants made a motion for a directed verdict, listing three specific grounds: (1) that Timmel and Dupre were not employers; (2) that there was no proof of the substantive denial of equal pay to Foster or Baker, nor any proof of retaliatory constructive discharge; and (3) there was no proof of willfulness. The defendants made no motion with respect to all three plaintiffs' claims that the promotion of Dupre to manager constituted retaliation under the EPA.

Under Fed. R. Civ. P. 50(a), a party making a motion for a directed verdict (now referred to as a "motion for judgment

as a matter of law") must specify the grounds upon which the motion relies. Furthermore, because a j.n.o.v. motion under Fed. R. Civ. P. 50(b) (now referred to as a "renewed motion for judgment as a matter of law after trial") is in reality a renewal of a motion for a directed verdict, it cannot assert new grounds for relief. Meriwether v. Coughlin, 879 F.2d 1037, 1044 (2d Cir. 1989); see also 9 Wright & Miller, Federal Practice and Procedure §2537, at 598 (1971). As a recent panel of this court astutely pointed out: "These two rules read together limit the grounds for judgment n.o.v. to those specifically raised in the prior motion for a directed verdict." Samuels v. Air Transp. Local 504, 992 F.2d 12, 14 (2d Cir. 1993).

We note that at times courts have been lax in enforcing this specificity

requirement at the directed verdict stage to preserve an issue for a j.n.o.v. motion, see, e.g., Cia. Mar. Adra S.A., 362 F.2d 118, 121-22 (2d Cir.), cert. denied, 385 U.S. 933 (1966), although more recently courts have more rigorously exacted compliance with the specificity requirement, see, e.g., Smith v. Lightening Bolt Prods., Inc., 861 F.2d 363, 367 (2d Cir. 1988); McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1555-56 (7th Cir. 1987).

If there were any doubts remaining as to the continued vitality of cases which disregarded the specificity requirement, the recent amendments to Rule 50 laid these doubts to rest. Although the amendments did not change the substantive standard for evaluating either a motion for a directed verdict or a motion for a j.n.o.v., instead merely renaming these

respective motions, the Advisory Committee's Notes indicate that the specificity requirement is obligatory and ensures that the other party is made aware of any deficiencies in proof that may have been overlooked. See Fed. R. Civ. P. 50 advisory committee's notes ("The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof."). The Notes explicitly state that the "revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict." Id.

Motivating the Advisory Committee's

concern for specificity was the desire to put a party on notice of potential deficiencies in its proof before the case is submitted to the jury. As Professor Moore explains, "[a] careful reading of the Advisory Committee Note indicates that the Committee was particularly interested in protecting the nonmovant's right to be informed, prior to submission of the case to the jury, of the alleged deficiencies in the case." 51 Moore & Lucas, Moore's Federal Practice ₱50.08, at 50-95 (2d ed. 1993).

Becuase the defendants failed even to raise the issue of the promotion of Dupre to manager at the directed verdict stage, let alone the grounds upon which they deserved judgment as a matter of law, they are not permitted to raise the issue in a subsequent j.n.o.v. motion. Defense counsel's prefatory remark at the directed

verdict stage that "as a matter of law the plaintiffs have failed to prove any of the claims they are entitled to prove in this phase of the trial" is insufficient to satisfy the specificity requirement of Fed. R. Civ. P. 50(a). If such a broad, general statement that "a party has failed to prove any and all of its claims" were held to satisfy Fed. R. Civ. P. 50(a), the specificity requirement of that rule would be rendered a nullity.

We note that the plaintiffs' petition for rehearing prompted us to reconsider a prior ruling of this panel that defense counsel's general prefatory remark at the directed verdict stage was sufficient to preserve the issue for a subsequent j.n.o.v. motion. Upon further consideration, we believe that the defendant's motion failed to meet the specificity requirement of Fed. R. Civ. P. 50(a), and

this Amended Opinion reflects this view. In all other respects, the petition for rehearing is denied.

Nevertheless, we affirm judgment for the defendants on the claim that Dupre's promotion to manager was an unlawful retaliation under the EPA because plaintiffs' allegations on this score, even if assumed to be true, do not state a claim under the EPA due to the different threshold requirements of an EPA retaliation claim as compared with a Title VII retaliation claim.

Title VII broadly provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in

an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. §2000e-3(a). The phrase "opposed any practice" encompasses an individual's complaints to supervisors regardless of whether she also files an EEOC charge. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 65 (2d Cir. 1992).

In contrast, FLSA's anti-retaliation provision makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. §215(a)(3). The EPA is an amendment to the FLSA and is codified under the same chapter; thus retaliation for filing

EPA complaints falls under §215(a)(3). The plain language of this provision limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor. See EEOC v. Romeo Community Sch., 976 F.2d 985, 990 (6th Cir. 1992) (Surheinrich, Jr., dissenting) (noting that §215(3) on its face prohibits retaliation based on "three expressly enumerated types of conduct," in contrast to the much broader retaliation protection afforded by Title VII). We note that a number of our sister circuits have held to the contrary. See Romeo Community Sch., 976 F.2d at 989-90 (holding that plaintiff's complaint that employer was "breaking some sort of law" by paying her lower wages was sufficient to constitute filing of Equal Pay Act action for purposes of §215(a)(3)); EEOC

v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 989) (noting that while complaints to supervisors were not acts "explicitly listed in the FLSA's anti-retaliation provision," reading such acts to be within the provision is merited since it would further the remedial purpose of the FLSA); Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984) (holding that §215(a)(3) "applies to the unofficial assertion of rights through complaints at work"); see also Crowley v. Pace Suburban Bus Div., 938 F.2d 797, 798 n.3 (7th Cir. 1991) (noting that section 215(a)(3) has been "construed broadly"). Because we hold that the statute's language is plain and unambiguous, we need not defer to the EEOC's interpretation in its compliance manual that the EPA retaliation provisions should encompass informal workplace complaints. See Chevron

U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter.").

Plaintiffs allege not that they filed any complaint or charge prior to Dupre's promotion, but only that they complained to Timmel that Baker should receive the same salary that Dupre received as charge person of the printing area, since her responsibilities in the microfilm area were substantially equivalent. We also note that they merely complained that it was "not fair" that Baker did not receive charge-person pay for her duties, without stating that sex was the reason for the disparity. Under these circumstances, no cause of action for Equal Pay Act retaliation will lie.

Our decision in Brock v. Casey Truck Sales, Inc., 839 F.2d 872 (2d Cir. 1988),

is easily distinguishable. In that case, the company fired workers who had the temerity to claim back pay that the company had agreed with the Labor Department to pay following an investigation that had arisen out of a worker's complaint to the Labor Department that workers were being denied compensation at overtime rates. We held that §215(a)(3)'s anti-retaliation provision applied, since "[p]rotection against discrimination for instituting FLSA proceedings would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act." Id. at 879. In contrast, the acts for which the Hospital allegedly retaliated were neither the filing of a claim nor acts, such as accepting a back pay award, that grew out of the filing of claims. They are simply oral complaints

to a supervisor that an employee was being paid less than the complainants thought she should have been.

We recognize that this issue was not presented to this court, and that the lower court assumed that informal complaints would be sufficient to state a claim under the EPA. However, we have discretion to consider and decide sua sponte a dispositive issue of law that, taking a plaintiff's factual allegations to be true, would prevent a plaintiff from recovering. See, e.g., Gregory v. United States/United States Bankruptcy Court, 942 F.2d 1498, 1500 (10th Cir. 1991) ("[S]ua sponte invocation of Rule 12(b)(6) on appeal may be appropriate in those rare instances in which a plaintiff cannot recover on the complaint because of a dispositive issue of law."), cert. denied, 112 S. Ct. 2276 (1992); Molecular

Technology Corp. v. Valentine, 925 F.2d 910, 920 (6th Cir. 1991) ("This court may, in its discretion, consider clear errors in the proceedings below in an unusual case sua sponte."); see also Romain v. Shear, 799 F.2d 1416, 1419 (9th Cir. 1986) (holding that an argument can be considered for the first time on appeal when, inter alia, "the issue is purely one of law and the necessary facts are fully developed"), cert. denied, 481 U.S. 1050 (1987).

Since the evidence was insufficient to establish a prima facie case of retaliation, plaintiffs' related argument that the district court erred in holding that punitive damages were unavailable to them under the EPA is moot.

As for the remaining claim on which the plaintiffs received a favorable jury verdict, Baker's claim that her position

in the microfilm area from February 1982 to September 1984 was equal to Dupre's charge-person position, the defendants properly preserved the issue in their directed verdict motion. Thus, we must consider the propriety of the district court's granting of the j.n.o.v.

It is well established in this circuit that a j.n.o.v. motion may only be granted where there is "such a complete absence of evidence supporting the verdict that the jury's finding could only have been the result o[f] sheer surmise and conjecture," or if the evidence is "so overwhelming that reasonable and fair minded persons could only have reached the opposite result." Sorlucco v. New York City Police Dep't, 971 F.2d 864, 871 (2d Cir. 1992) (quoting Stubbs v. Dudley, 849 F.2d 83, 85 (2d Cir. 1988), cert. denied, 489 U.S. 1034 (1989)).

We believe that the district court erred in granting defendants' motion for j.n.o.v. on Baker's EPA claim that she was denied equal pay for her work in the microfilm area, since the jury had before it sufficient evidence to support a verdict in Baker's favor.

To establish a claim under the Equal Pay Act, a plaintiff need not prove that her job is identical to a higher-paid position, but only must demonstrate that the two positions are "substantially equal." Hodgson v. Corning Glass Works, 474 F.2d 226, 234 (2d Cir. 1973), aff'd 417 U.S. 188 (1974); Koster v. Chase Manhattan Bank, N.A., 609 F.Supp. 1191, 1193 (S.D.N.Y. 1985). However, where jobs are merely comparable, an action under the Equal Pay Act will not lie. Hodgson, 474 F.2d at 230-31; Koster, 609 F.Supp. at 1193.

There was sufficient evidence before the jury for it to conclude that the formalized charge-person position in the printing area occupied by Dupre and Baker's position in the microfilm area were both quasi-supervisory positions intended to fill in gaps in management responsibilities left by Shiels's frequent medical leaves. The jury's decision that these positions were substantially equivalent, and not merely of comparable value, had a reasonable basis in the evidence. We therefore reverse the district court's grant of j.n.o.v.

While not explicitly mentioning Baker's related Title VII claim for denial of equal pay on account of sex, the court presumably entered j.n.o.v. for defendants on this claim as well because the court relied upon the jury verdict's binding effect when it entered judgment on behalf

of Baker. In light of the court's erroneous entry of j.n.o.v. on Baker's substantive EPA claim, this judgment must also be reversed.

However, the district court, pursuant to Rule 50(c), granted a new trial in the alternative on these claims. A grant of a new trial for insufficiency of the evidence is not reviewable in this circuit. Dunlap-McCuller v. Riese Org., 980 F.2d 153, 157-58 (2d Cir. 1992), cert. denied, 114 S. Ct. 290 (1993). We therefore remand these claims for a new trial.

B. Related Title VII and Human Rights Law Claims

As stated above, the district court ruled from the bench that the jury verdict on the plaintiffs' EPA claims had binding effect on the related Title VII and HRL claims stemming from the same facts. When entering j.n.o.v. in favor of the defendants on the plaintiffs' EPA

retaliation claims, the district court noted that judgment as a matter of law must also be entered on the related Title VII and HRL claims because there was "no other basis to support a verdict" aside from the jury's verdict. As we explained above, the district court improperly considered the defendants' j.n.o.v. motion on the plaintiffs' EPA retaliation claims because it was procedurally barred. However, because the plaintiffs failed to establish a cause of action under the EPA for retaliation, and thus their claims should never have been submitted to the jury, the jurys' verdict is equally infirm, and thus cannot have binding effect. See Marshall v. Nelson Elec., 766 F.Supp. 1018, 1027 (N.D. Okla. 1991) ("[I]f the...claim should not have been submitted to the jury in the first place, the jury's findings are viewed as an academic exer-

cise, a nullity, and nothing more than advisory. Under such circumstances, the jury's factual findings would not be binding on the Court for purposes of the Title VII claim."), aff'd without opinion, 999 F.2d 547 (10th Cir. 1993); Swentek v. USAir, Inc., 830 F.2d 552, 559 (4th Cir. 1987) ("The Seventh Amendment does not require the trial judge to conform his findings to a jury verdict that is infirm.")

Examining the plaintiffs' retaliation claims under Title VII and the HRL, we hold that the plaintiffs failed to proffer evidence that could support a finding that a retaliatory motive played a part in the Hospitals' promoting Dupre rather than one of the plaintiffs. The job qualifications of the manager position - five to six years printing experience, design and typesetting experience, and familiarity

with microfilm process - had been the same since 1977, before any of the plaintiffs worked in the Department. Although plaintiffs produced evidence at trial sufficient to support a conclusion that Dupre's printing skills were lacking, there is no evidence that he failed to meet the qualifications set forth in the job description, or that the plaintiffs met them. See Canino v. EEOC, 707 F.2d 468, 471 (11th Cir. 1983) (no prima facie case of retaliatory failure to promote where plaintiff did not meet qualifications of position sought); Ashker v. International Business Machs. Corp., 168 A.D.2d 724, 725, 563 N.Y.S.2d 572, 573 (3d Dep't 1990) (in unlawful discharge case brought under the HRL, employee must prove qualification for the job from which she was discharged); see also State Div. of Human Rights ex rel. Carey v. Human

Rights Comm'r of Syracuse, 79 A.D.2d 181, 185, 436 N.Y.S.2d 502, 505 (4th Dep't 1981) (upholding retaliation award under HRL where plaintiff was qualified for position and employer failed to hire her because of prior filing of complaint). Nor is there evidence showing that the job description was tailored specifically to select Dupre or pass over the plaintiffs or women generally. See Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721, 728-29 (8th Cir. 1982); Hartman v. Wick, 600 F.Supp. 361, 363-64 (D.D.C. 1984). To the contrary, the job qualifications were established long before any of the plaintiffs worked in the Department, and further, we note that before Dupre, the manager's position was held by a woman - Terri Shiels - from the creation of the Department in 1976 until her death in 1984. In sum, the record is devoid of any

direct or circumstantial evidence that could show that a retaliatory motive underlay Dupre's promotion to manager.

Because we find that defendants were entitled to judgment as a matter of law on the Title VII and HRL retaliation claims based on Dupre's promotion to manager, there is no need to vacate the district court's decision on these matters to preserve the plaintiffs' jury trial rights under the HRL. Even though we agree that plaintiffs were entitled to a jury trial on their HRL claims, and the usual course would be to vacate the district court's judgments on both the Title VII and HRL claims arising from Dupre's promotion to manager to prevent the collateral-estoppel effect of the district judge's factual determinations from undermining the litigant's jury-trial rights, see Lytle v. Household Mfg., Inc., 494 U.S. 545, 552-53

(1990), here there is no need to remand the retaliation and sex-discrimination Title VII and HRL claims arising from Dupre's promotion to manager since, as a matter of law, plaintiffs fail to satisfy threshold elements of their claims.

IV. Summary Judgment

Finally, plaintiffs challenge the grant of summary judgment in favor of the defendants on four groups of claims.

First, plaintiffs assert error in the dismissal of the Equal Pay Act claims of Lambert and Foster that they were paid less for operating the 360 press than the male operators received for operating the 385 press. However, plaintiffs' own expert's data gave the 385 position a "job worth" score nine-percent higher than the 360 press position. It also was undisputed that the 385 operators had substantially more experience operating

printing presses. The district court correctly determined that there could be no violation of the Equal Pay Act as a matter of law since plaintiffs proposed no facts that would show that the positions were substantially equal.

Foster contends that the district court erred in dismissing her Title VII claim that the Hospital refused to assign her to the 360 printer on her return from maternity leave (although the Hospital did pay her the salary and benefits of a 360 operator). Title VII requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same as other employees who have temporary disabilities. 42 U.S.C. §2000e(k). The Hospital's leave of absence policy states that "the Hospital is unable to guarantee return to one's original position following a Leave of Absence (except for short-

term Military Leaves as defined by Law). . . ." Plaintiffs have offered no evidence that the Hospital departed from this policy in a discriminatory manner, or that the policy itself was designed to discriminate against pregnant women, either of which could have raised an inference of discrimination against Foster based on her pregnancy. We find no error in the district court's grant of summary judgment for the defendants on this claim.

The district court also properly granted summary judgment for the defendants on plaintiffs' Title VII and HRL claims of discrimination in the transfer of employees to the 360 and 385 presses, since the plaintiffs failed to produce any evidence to support an inference of discriminatory motive in the assignment of employees to the various printer positions.

Finally, the district court properly granted summary judgment on Foster's claim that she was denied the printing charge-person position because of her sex, since she never applied for the position. See McDonnell Douglas, 411 U.S. at 802.

Plaintiffs make a host of objections to various evidentiary rulings by the district court, all of which we find to be without merit.

CONCLUSION

We reverse the district court's grant of j.n.o.v. on Baker's Equal Pay Act claim (and thereby her related Title VII and HRL Claims) that she was denied equal pay for the microfilm charge-person duties and remand it to the district court for a new trial. Further, we hold that plaintiffs failed to establish a cause of action under the EPA for retaliation because they failed to file any formal complaints. We

affirm the district court's determination that the plaintiffs were not entitled to a jury trial on their Title VII claims, but reverse the court' determination that they were not entitled to a jury trial on their HRL claims. We therefore vacate and remand those HRL claims for which defendants were not entitled to judgment as a matter of law: Foster's claim that she was paid less than Dupre when she worked in the office during her pregnancy; the claims of Baker and Foster for constructive discharge; and the claims of all three plaintiffs for miscellaneous acts of retaliatory harassment. We also vacate the district court's judgments on the Title VII claims arising from the same facts, to prevent the district court's judgments from the bench from having preclusive effect on the HRL claims, and remand them to the district court. Also,

while the district court properly found Baker's and Lambert's Title VII claims of discrimination in Dupre's promotion to charge person to be time-barred, since a three-year statute of limitations applies to HRL claims, see Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 307, 461 N.Y.S.2d 232, 239 , 448 N.E.2d 86, 93 (1983), their charge-person claims under the HRL appear, on the present record, to be timely; thus the district court's judgment for the defendants on this issue is vacated and remanded to the district court for further proceedings.

The district court entered judgment for the defendants on the remainder of the plaintiffs' claims on summary judgment or j.n.o.v., or after deciding the claims from the bench. All of these claims either were properly decided as a matter of law by the district court, or could

have been so decided had the district court not decided them from the bench. We therefore affirm the district court's entry of judgment for the following claims: the Title VII and HRL claims of discrimination in transfers among the various printer and clerk positions of all three defendants; the EPA, Title VII, and HRL claims of Lambert and Foster that they were paid less for operating the 360 press than men were for the 385; Foster's claim under Title VII and the HRL that she was discriminated against in her assignment upon return from maternity leave; Foster's claim of discrimination in violation of Title VII and the HRL in Dupre's promotion to charge person; and the claims under Title VII and the HRL that Dupre's promotion to manager constituted retaliation and sex discrimination.

The EPA claims for which the jury found

for the defendants are not challenged on this appeal. The district court's evidentiary rulings are affirmed. The parties shall bear their own costs.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of December, one thousand nine hundred and ninety-three.

JANINE LAMBERT, EVA BAKER,
TAMI FOSTER,

Plaintiffs-Appellants,

-v.- DOCKET NUMBER: 92-7570

GENESEE HOSPITAL, FRANCIS DUPRE,
Individually, and as Manager of the
Duplicating Services Department of the
Genesee Hospital, Tod Timmel,
Individually, and as Materials Manager,

Defendants-Appellees

United States Court of Appeals
Filed
December 9, 1993
George Lange III, Clerk
Second Circuit

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by
Appellant Janine Lambert, Eva Baker, & Tami Foster

Upon consideration by the panel that

decided the appeal, it is

Ordered that said petition for rehearing is DENIED, and the opinion of September 17, 1993 is amended as of November 24, 1993.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

By: /s/ Carolyn Clark Campbell
Chief Deputy Clerk

Supreme Court, U.S.
FILED
APR 1 1994
OFFICE OF THE CLERK

(2)

No. 93-1388

In The

Supreme Court of the United States

October Term, 1993

JANINE LAMBERT, EVA BAKER and TAMI FOSTER,
Petitioners,

vs.

THE GENESEE HOSPITAL, FRANCIS DUPRE, Individually and as Manager of the Duplicating Services Department of The Genesee Hospital, TOD TIMMEL, Individually and as Materials Manager,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Did the plaintiffs introduce sufficient evidence to prove that they each were denied promotion to Department manager because of their sex or unlawful retaliation, given that no plaintiff applied or met the stated qualifications for the position?

2. Did the Second Circuit correctly decline to review the district court judge's grant of a new trial in the alternative?

3. Did plaintiffs fail as a matter of law to prove that each of them was denied the manager job due to unlawful retaliation under the Equal Pay Act because: a) none of them filed an Equal Pay Act complaint before the manager was selected, and b) none of them met the job's stated qualifications nor applied, and the Second Circuit incorrectly barred defendants from seeking judgment notwithstanding the verdict (j.n.o.v.) on this latter basis?

4. Did the district court correctly grant partial summary judgment to the defendants on various fact-specific issues?

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Second Circuit are listed in the caption. Defendant The Genesee Hospital ("Hospital") is a non-profit general hospital located in Rochester, New York. It has no parent company and no non-wholly owned subsidiaries.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JANINE LAMBERT, EVA BAKER and TAMI FOSTER,

Petitioners

v.

THE GENESEE HOSPITAL, FRANCIS DUPRE, Individually and as Manager of the Duplicating Services Department of The Genesee Hospital, TOD TIMMEL, Individually and as Materials Manager,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Defendants The Genesee Hospital, Francis Dupre, and Tod Timmel respectfully request that the Court deny plaintiffs' petition for writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

This case was tried before the Hon. David G. Larimer, Western District of New York. Judge Larimer's opinion is

unpublished. Plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which issued its original opinion September 17, 1993. Plaintiffs petitioned for rehearing en banc, and that petition was denied December 9, 1993. The Second Circuit issued an amended opinion as of November 24, 1993, published at 10 F.3d 46 (2d Cir. 1993).

PERTINENT STATUTES

Equal Pay Act, 29 U.S.C. § 215(a)(3):

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person --
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> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees. . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

COUNTER-STATEMENT OF THE CASE

This sex discrimination case arises out of employment decisions by The Genesee Hospital ("Hospital") shortly before and after the death in May 1984 of Terri Shiels. Ms. Shiels was the long-term, female Department manager of the Hospital's Duplicating Services Department ("Department").

When the three female plaintiffs joined the Department in 1980 and 1982, they had no prior printing or microfilming experience. When defendant Francis ("Bo") Dupre was hired as a printer in 1982, he had six years prior work experience as a printer. Shiels died in 1984. Her supervisor, defendant Tod Timmel, sought

candidates for her position by posting the vacancy within the Hospital (A. 6470) and by placing an advertisement in the newspaper (A.6471).[1]

The stated qualifications for the job were lifted word-for-word from the job description that Shiels had fulfilled as Department manager and which had been in place since the 1970's. (A. 6526, 6512). The qualifications included 5-6 years experience in the type of work done by the Department. Dupre had this experience; the plaintiffs did not. All three plaintiffs admit they were aware that the job vacancy was posted, yet none of them applied. (A. 3440, 4008, 4011,4321). Dupre applied, was interviewed, and in September 1984, was selected as Department manager.[2]

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[1] Footnotes designated (A.--) refer to the record on appeal. Those designated (--a) refer to the amended Second Circuit opinion attached as an Appendix to the Petition for Writ of Certiorari.

[2] Timmel chose Dupre as manager because he met the stated qualifications and because he considered Dupre to be the best candidate of those who had applied. (A. 4766). Contrary to the assertion in footnote 5 of plaintiffs' petition, the Hospital does not claim it selected Dupre because he was a "skilled printer." Defendants therefore do not address factual inaccuracies in plaintiffs' petition on this and other issues irrelevant to the

The three plaintiffs filed EEOC charges dated October 1984. They later commenced this action, alleging that their failure to be selected as manager constituted sex discrimination and unlawful retaliation by the Hospital.

In their lawsuit, the three plaintiffs also challenged every other employment decision in the Department from which they did not benefit. They claimed that Timmel's transfers and reassignments of Department personnel within the Department from 1982 to 1984 were discriminatory and constituted retaliation. These changes were made to cover both Shiels' medical leaves of absences as she became increasingly ill, and Foster's pregnancy leave and work restrictions. They included appointing Dupre as temporary "charge-person" over the Department's printing area while Shiels was ill. Plaintiffs also objected to the Hospital classifying the operator of the larger printing press one wage grade higher than the operator of the smaller press.

Plaintiffs also claimed that Dupre discriminated and retaliated against them when he became Department manager by, for

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holdings below.

example, not letting plaintiffs or their friends smoke in no-smoking areas, and telling Foster that two printing jobs were "rush" when they were not. Baker and Foster quit their jobs a few months after Dupre became manager. Each claimed Dupre constructively discharged her, even though Dupre had convinced Baker to rescind a previous resignation soon after he became manager.

The district court judge granted summary judgment on several issues very near to the trial date. The judge anomalously allowed plaintiffs' challenge to the manager appointment to go to trial in order to give plaintiffs an opportunity to produce evidence justifying their failures to apply and to meet the job qualifications.

The Equal Pay Act claims, including claims of alleged retaliation under the Equal Pay Act, were heard by a jury. The trial lasted over five weeks. Over strenuous objections by defendants, the judge allowed extensive testimony about the claims he had already dismissed as defective as a matter of law. (*E.g.*, A. 3393-3396, 3426-3431, 3576-3577, 3848-3849, 4076-4080).

The jury found in favor of defendants on all the retaliation claims against Dupre and on Foster's substantive Equal Pay Act

claim. Over defendants' objections to the jury instructions, the jury found that the defendants had retaliated against all three plaintiffs by not selecting all of them as manager. The jury also found that Baker had been denied equal pay for her microfilm clerk duties within the microfilm area. The jury apparently concluded that Baker should have received the same $12/week raise that Dupre received when he acted as charge-person of the printing area.

The judge took additional testimony on plaintiffs' Title VII claims and Human Rights Law claims and rendered judgment for the defendants on all issues except those on which he believed he was bound by the jury verdict.

In response to defendants' motion for judgment notwithstanding the verdict (j.n.o.v.) and a new trial in the alternative, the judge granted j.n.o.v. dismissing those claims for which the jury had ruled for plaintiffs. In particular, the district judge found that the plaintiffs did not apply for or meet the qualifications for the Department manager position, and therefore failed as a matter of law to prove sex discrimination or unlawful retaliation. He also found that Baker, as a matter of law, did not

perform duties substantially equal to those of Dupre when Dupre was charge-person: Baker was indisputedly a microfilm clerk and not a printer, and Dupre performed supervisory functions such as completing performance appraisals, while Baker did not. The judge granted a new trial in the alternative should j.n.o.v. be reversed.

On appeal, the Second Circuit upheld the district court's rulings with two exceptions. The Second Circuit remanded the New York Human Rights Law claims for trial by jury, instead of by bench. The Circuit also reversed the j.n.o.v. on Baker's Equal Pay Act claim, but affirmed the grant of a new trial. Finally, the Circuit held that, as a matter of law, plaintiffs had not produced evidence showing they were discriminated or retaliated against under any statute with regard to the manager job.

Plaintiffs petitioned for a rehearing. The Second Circuit issued an amended opinion without permitting defendants to respond to the petition, as is "ordinarily" required under Rule 40 of the Federal Rules of Appellate Procedure. The opinion contained the same holdings, but eliminated one legal basis for overturning the jury verdict regarding the manager job. The Second Circuit

concluded that defendants had not argued in their directed verdict motion that plaintiffs had not applied and were not qualified to be manager. Therefore, defendants were barred from challenging the jury verdict on this ground. The Second Circuit ignored the fact that during trial the district judge explicitly stated in open court that he was considering granting defendants' directed verdict motion on the grounds that plaintiffs had not applied for the manager job. (A.5929-5930). The Second Circuit continued to uphold the dismissal of plaintiffs' challenge to the manager decision because plaintiffs had not fulfilled the prerequisites for stating a retaliation claim under the Equal Pay Act. Plaintiffs had merely stated to Hospital personnel that it was "not fair" that Baker was not receiving charge-person pay; they had not filed a formal Equal Pay Act complaint before Dupre was selected as manager.

As of the date of this petition, the district court has scheduled a retrial to be held in September 1994 on plaintiffs' Human Rights Law claims and Baker's remaining Equal Pay Act claim.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Because the Second Circuit Has Remanded This Case For a New Trial, the Second Circuit's Ruling is Interlocutory and Therefore Not Appropriate For Review by This Court.

As discussed above in the Counter-Statement of the Case, the Second Circuit ordered that this case be remanded for a new trial on various issues under the New York Human Rights Law, N.Y. Exec. Law §§ 291 et seq., and the Equal Pay Act, 29 U.S.C. § § 206(d) et seq. Review by this Court is a matter of judicial discretion, which the Court will exercise "only when there are special and important reasons therefor." Sup. Ct. R. 10, 493 U.S. 1097, ---, 110 S. Ct. 21 (1989). It has been the general practice of this Court not to exercise its discretion to review an interlocutory order because the lower courts may render moot any issues raised. Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co., 389 U.S. 327, 328 (1967); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); Estelle v. Gamble, 429 U.S. 97, 114-115 & n.9 (1976) (Stevens J., dissenting); Virginia Military Inst. v. United

States, -- U.S. -- , 113 S. Ct. 2431-32 (1993) (Scalia, J., concurring).

Although this Court has made exceptions to the general rule, this case presents none of the articulated concerns on which the Court has based review of an interlocutory order. This case does not raise any question important to the administration of federal criminal laws. Carroll v. United States, 354 U.S. 394, 397 (1957). Nor does the case present an issue "fundamental to the further conduct of the case." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949); Land v. Dollar, 330 U.S. 731, 734 (1947); United States v. Gen. Motors Corp., 323 U.S. 373, 374-75 (1945). Plaintiffs raise no novel and important question "deeply affecting the administration of justice in the Circuit Court of Appeals," the answer to which might render the lower court's decision void. Am. Constr. Co. v. Jacksonville, T. & K. W. R. Co., 148 U.S. 372, 387 (1893). And although plaintiffs claim a conflict among the circuits, the conflicts alleged do not go to the heart of "fundamental questions," Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 408-09 (1916), let alone overcome the other reasons, discussed *infra*, why the Court should not grant plaintiffs' petition.

II. Plaintiffs' Challenge to the Promotion of Defendant Dupre Presents no Question of Significance to This Court.

In their first point, plaintiffs present a question that concerns only the particular facts of this case, and thus not a question this Court should review. United States v. Johnston, 268 U.S. 220, 227 (1925); Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949); NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 176 n.8 (1981). Plaintiffs challenge the Second Circuit's ruling that they furnished no facts concerning the selection of the Department manager that were sufficient to state a claim for sex discrimination or retaliation under either Title VII of the Civil Rights Act of 1964 or the New York Human Rights Law.[3] Plaintiffs also appear to challenge the Second

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[3] In assessing discrimination claims under the New York Human Rights Law, the New York state courts have applied the analysis set out by this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). *See e.g.*, Miller Brewing Co. v. State Div. of Human Rights, 66 N.Y.2d 937 (1985)(mem. decision).

Circuit's conclusion that there was no retaliation under the Equal Pay Act, even though the Second Circuit relied on a different basis for this holding (which is discussed further in Point IV, *infra*).

Regardless of how plaintiffs characterize their argument, both the district court and the Second Circuit held that, as a matter of law, no plaintiff could prove she was unlawfully denied the Department manager position because of her sex or because of unlawful retaliation. It was undisputed that none of the plaintiffs met the qualifications for the Department manager's job and that none of them even applied for the job. (86a). *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (plaintiff must meet the stated qualifications and apply for the job to state a *prima facie* case of discrimination). Plaintiffs offered no evidence that the stated job qualifications, taken word-for-word from the job description of the previous female Department manager, could be pretexts for sex discrimination or unlawful retaliation against plaintiffs. (87a).

Moreover, none of the plaintiffs was excused from applying for the manager job as part of her *prima facie* burden. No plaintiff

presented evidence that her application would have been futile under the principles of International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)(citing example where practices are tantamount to a sign on door reading "Whites Only," in the case of racial discrimination). Plaintiffs' sole basis for claiming futility is that defendant Timmel said he planned to include outside candidates in his job search. Yet, all three plaintiffs admit they were aware that the Hospital also had posted the job vacancy internally. There was no evidence whatsoever that any Hospital representative (or anyone else) instructed the plaintiffs not to apply. Under these circumstances, plaintiffs cannot show futility as a matter of law. Teamsters, 431 U.S. at 365. Their collective failure to apply for the position is fatal to their claims. *Accord*, Box v. A & P Tea Co., 772 F.2d 1372, 1376-77 (7th Cir. 1985), cert. denied, 478 U.S. 1010 (1986); Giles v. Ireland, 742 F.2d 1366, 1376-77 (11th Cir. 1984).

III. The Second Circuit Correctly Declined to Review the District Court Judge's Grant of a New Trial in the Alternative on Baker's Equal Pay Claim.

After overturning the district court judge's grant of j.n.o.v. on whether Baker was entitled to charge-person pay under the Equal Pay Act, the Second Circuit held that it could not review the judge's grant of a new trial in the alternative because the judge had ruled that the verdict was against the weight of the evidence. The Second Circuit, without any further analysis, relied on its prior panel decision in Dunlap-McCuller v. Riese Org., 980 F.2d 153 (2d Cir. 1992), cert. denied, 114 S. Ct. 290 (1993), in support of its ruling. Plaintiffs claim that the Second Circuit's holding creates a conflict among the circuits, warranting review by this Court.

This issue is not appropriate for review for several reasons. First, plaintiffs' substantive claim has been remanded for retrial, and plaintiffs may yet prevail.

Second, there is an intracircuit dispute within the Second Circuit concerning whether orders granting or denying a new trial are immune from review or should be reviewed under an abuse of

discretion standard. In several recent cases, Second Circuit panels have adopted the majority rule that the Circuit will review orders for abuse of discretion. *See, e.g.*, Diamond D Enterprises USA, Inc. v. Steinsvaag, 979 F.2d 14 (2d Cir. 1992), cert. denied, 113 S. Ct. 2442 (1993); Song v. Ives Laboratories, Inc., 957 F.2d 1041 (2d Cir. 1992); Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992); Purnell v. Lord, 952 F.2d 679 (2d Cir. 1992). None of these panels has stated definitively that the Second Circuit has adopted one rule or the other for all future cases, nor has the entire Circuit considered the issue *en banc*.

Thus, it is not clear that the Second Circuit has solidified its position on this issue, creating a true conflict among the circuits. Because the Second Circuit has not resolved this issue, it would be more appropriate for this Court to permit the Circuit to determine its final position on its own, without premature -- and perhaps unnecessary -- intervention. *See, e.g.*, Davis v. United States, 417 U.S. 333, 340 (1974); Justice Harlan, *Manning the Dikes*, 13 Record of N.Y. City Bar Assoc. 541, 552 (1958) ("[D]ecisions between different panels of the same Court of Appeals will not be considered

to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself").

Third, even if the Second Circuit had reviewed the trial court's order using an "abuse of discretion" standard, the Circuit still would have sustained the order for all the reasons the judge granted j.n.o.v.[4] This is true even though the Circuit overturned the judge's ruling on j.n.o.v. In reviewing a j.n.o.v. ruling, the appellate courts review the facts *de novo*. *See*, Phelps v. Yale Security, Inc., 986 F.2d 1020, 1023 (6th Cir.), cert. denied, -- U.S. --, 114 S. Ct. 175 (1993). In reviewing an order for abuse of discretion, the Circuit does not assess the facts on its own, but merely considers whether the judge's ruling is "clearly unreasonable, arbitrary, or fanciful. . . ." Hendler v. United States, 952 F.2d 1364, 1380 (Fed. Cir. 1991). The trial judge overruled the jury verdict because he determined that on the facts of this case, no reasonable jury could have found for the

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[4] This applies equally to the district judge's grant of a new trial on plaintiffs' claims of retaliatory denial of promotion, as discussed more fully in Point II, *infra*.

plaintiffs. Verdegaal Bros., Inc. v. Union Oil Co. of California, 814 F.2d 628, 631 (Fed. Cir.), cert. denied, 484 U.S. 827 (1987). Baker worked as a microfilm clerk, while Dupre was a printer. Dupre, as printing area charge person, prepared performance evaluations and disciplined other employees, while Baker did not. (A. 3974-3976, 4025, 6915-6920). Thus Baker could not prove that her duties in the microfilm area and Dupre's duties as charge-person of the printing area were "substantially equal" under the Equal Pay Act. Because there is substantial evidence in the record to support the trial judge's decision, the Second Circuit would have upheld the judge's order even if it had used the highly deferential "abuse of discretion" standard.

Indeed, not only should the district court's grant of a new trial be upheld, but the j.n.o.v. granted by the district court should be reinstated because, as a matter of law, Baker could not show that she performed the same job duties as Dupre.

IV. The Second Circuit's Statement That the Equal Pay Act Requires an Employee to File a Formal Complaint in Order to Come Within the Act's Protection from Retaliation Does Not Warrant Review by This Court.

A. The Second Circuit's fact-specific ruling does not necessarily conflict with the rulings of other circuits

The decision below does not indicate any real conflict among the circuits. The Second Circuit held that plaintiffs failed to show they had "filed a complaint" within the meaning of the Equal Pay Act where they merely complained within the Hospital that it was "not fair" that Baker was not receiving charge-person pay, without ever stating they believed sex was the reason for the disparity. (76a).[5] The Second Circuit concluded that the Equal Pay Act requires an employee to file a formal complaint before he or she can state a claim for alleged retaliation based on that complaint. (73a-

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[5] Plaintiffs assert in their petition that they also complained of "sex discrimination" to the Hospital president. They refer, however, to a complaint they allegedly made after Dupre was selected manager. (A. 3452-3455). This complaint has no bearing on whether plaintiffs stated a claim for retaliation for denial of the manager position, which was the issue before the Second Circuit.

74a). Although this statement does not agree with those of other circuits cited in the Second Circuit opinion, the Circuit's actual holding does not create a conflict with those opinions, given the circumstances of this case.

In none of these opinions did a court permit an informal complaint to a supervisor to serve as a predicate for an Equal Pay Act retaliation claim where the complaint is merely one of "unfair" wages. The other circuits have required more explicit action by an employee to evoke the protection of the Act. For example, in Love v. RE/MAX of America, Inc., 738 F.2d 383 (10th Cir. 1984), the plaintiff attached a copy of the Equal Pay Act to her complaint to the company president about her wages. In EEOC v. Romeo Community Schools, 976 F.2d 985, 989 (6th Cir. 1992), the parties did not dispute that the plaintiff had complained of unlawful sex discrimination and told her employer she believed it was "breaking some sort of law." In EEOC v. White & Son, 881 F.2d 1006 (11th Cir. 1989), the female plaintiffs asked why male employees, and not they, had received a raise, and then requested equal pay. In Brock v. Richardson, 812 F.2d 121 (3d Cir. 1987), the employer mistakenly

believed that the employee had filed a formal complaint. And in Brennan v. Maxey's Yamaha, 513 F.2d 179 (8th Cir. 1975), the plaintiff protested her employer's actions as illegal and wrong after the Department of Labor had investigated the employer and the employer had agreed to pay back wages.

The instant opinion of the Second Circuit is not contrary to these decisions. Indeed, the Court below specifically reaffirmed its prior decision in Brock v. Casey Truck Sales, Inc., 839 F.2d 872 (2d Cir. 1988), where the court found retaliation after a plaintiff complained to her supervisor about actions relating to a prior Department of Labor investigation. The Second Circuit has not indicated whether it will expand its holding below to include informal complaints that clearly state their basis in the Equal Pay Act. Until and unless the Second Circuit holds that under no circumstances can an informal complaint form the basis for a retaliation claim, the positions of the Circuits are not in true conflict.

B. The plaintiffs as a matter of law were unable to prove retaliation in any event

On the facts of this case, plaintiffs cannot prove retaliation under the Equal Pay Act. Even if certain informal complaints were sufficient to evoke the protection of the statute, this is not the appropriate case for the Court to review.

In order to prove retaliation, plaintiffs must prove that (1) they engaged in a protected activity; (2) the employer was aware of this activity; (3) the employer took an employment action disadvantaging the plaintiffs; and (4) there is a causal connection between the protected activity and the disadvantageous employment action. Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980); De Cintio v. Westchester County Medical Center, 821 F.2d 111, 115 (2d Cir.), cert. denied, 484 U.S. 965 (1987). Even assuming that plaintiffs met the first element of this test by complaining informally to their supervisor, plaintiffs' claims are not saved because they failed to fulfill two of the other requirements of the test.

When plaintiffs complained about the fact that Baker was not receiving charge-person pay, they did not do so in a way that made the employer "aware of" the alleged protected activity. As noted above, at no time before Dupre was selected as manager did any of the plaintiffs claim that Baker or the others were being paid less than a male member of the Department because of their sex. The only complaint plaintiffs made was that it was "not fair" that Baker was not receiving charge-person pay, without asserting that sex discrimination was involved. (76a). Such vague comments were insufficient to put the Hospital on notice that plaintiffs were attempting to assert rights under the Equal Pay Act.

Nor did plaintiffs show any nexus between Dupre's promotion and their complaints. As discussed in Point II and in the Counter-Statement of the Case, *supra*, Dupre met the stated qualifications for the job, while plaintiffs did not, and Dupre applied for the job, while plaintiffs did not. As a matter of law, plaintiffs could not show they were denied the manager position due to unlawful retaliation.

The Second Circuit erroneously refused to reach this issue on the ground that defendants had not challenged the promotion decision in their directed verdict motion, thereby barring defendants from challenging it upon a motion for j.n.o.v. *See* Fed. R. Civ. P. 50. This ruling stands on its head the meaning of Rule 50; *i.e.*, to prevent the movant from using a j.n.o.v. motion as a "trap" for springing new defenses upon an opponent. *See* Ebker v. Tan Jay Int'l Ltd., 739 F.2d 812, 824 (2d Cir. 1984). The district judge discussed this directed verdict issue with both counsel in open court during trial:

> We have revisited this a couple of times here, but you know, interesting facts, you have got two [sic] people here claiming they should have been manager who didn't even apply, which gives me great pause, really, as to whether a directed verdict should be granted on that basis alone.
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> ... That's right, that's right [that all three plaintiffs did not apply]. (A.5929-30).

The judge also addressed this issue at great length in his decision denying summary judgment shortly before trial began.

C. The decision below was correct based on the plain language of the Equal Pay Act

The Second Circuit's construction of the Equal Pay Act was correct because it follows the plain language of the statute. This Court has held that in construing a statute, the "'starting point must be the language employed by Congress.'" Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (citation omitted); Mallard v. United States Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296, 300 (1989) ("Interpretation of a statute must begin with the statute's language"). In reviewing the language of a statute, the Court assumes "'that the legislative purpose is expressed by the ordinary meaning of the words used.'" Am. Tobacco, 456 U.S. at 68 (citation omitted). If "the intent of Congress is clear, that is the end of the matter; for the court. . . must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

The intent of Congress in enacting the section of the Equal Pay Act codified at 29 U.S.C. § 215(a)(3) is clear and unambiguous.

Congress declared that an employer may not discharge an employee or take other adverse action against the employee if the employee

> has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee

(emphasis added). By its terms, therefore, Section 215(a)(3) "protects from retaliation only those employees who engage in three expressly enumerated types of conduct." Romeo Community Schools, 976 F.2d at 990 (emphasis added)(Surheinrich, J., dissenting in part).

The anti-retaliation provision of the Equal Pay Act contrasts with its much broader counterpart in Title VII. In addition to protecting employees who make a charge, testify, assist, or participate in an investigation or proceeding, Title VII also protects from retaliatory action any employee who "oppose[s] any practice made an unlawful employment practice by this subchapter. . . ." The plaintiffs here do not allege, let alone present evidence, that they met the requirements of the Equal Pay Act by filing a complaint,

instituting a proceeding, testifying in a proceeding, or serving on an industry committee before Dupre was selected as manager. Thus, their actions do not come within the plain language of the statute.

The construction plaintiffs propose is directly contrary to the express terms of the statute.[6] This Court has held that "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." Am. Tobacco, 456 U.S. at 75 (citation omitted). As the language of the Equal Pay Act is clear on

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[6] Plaintiffs claim that the Second Circuit's holding is contrary to EEOC guidelines. Such guidelines, however, "do not have the force of law. . . ." Int'l Assoc. of Firefighters v. Cleveland, 478 U.S. 501, 518 (1986). Agency guidelines are "'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" Cleveland, 478 U.S. at 518 (emphasis added) (quoting Gen. Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976)). Courts are not bound by the EEOC's interpretation, however. "[W]hen an agency attempts to give meaning to a statute that is plain on its face, we need not defer to the agency. . . ." Fertilizer Inst. v. United States EPA, 935 F.2d 1303, 1309 (D.C. Cir. 1991); New York City Health & Hospital Corp. v. Perales, 954 F.2d 854 (2d Cir. 1992), cert. denied, -- U.S. --, 113 S. Ct. 461 (1992). On the contrary, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron, 467 U.S. at 843 n.9.

its face, there is no need to go beyond the statute in an attempt to create a contrary meaning.

D. The ruling below presents no question of general importance

Furthermore, contrary to plaintiffs' assertion, allowing the Second Circuit's ruling to stand will not eviscerate the protection afforded to employees under the law. As discussed above, employees claiming sex discrimination are afforded broad protection from unlawful retaliation under Title VII. Plaintiffs in this case, in fact, brought their retaliation claims under both statutes. The 1991 amendments to Title VII allowing jury trials for Title VII actions further remove any differences between actions under the two statutes.[7] Thus, future plaintiffs who claim discrimination will not

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[7] This Court has denied certiorari, despite a conflict between the circuits, if a statute has expired or been amended in a manner that will prevent the problem from arising in the future. *See, e.g.*, United States v. Abrams, 344 U.S. 855 (1952); Community Services, Inc. v. United States, 342 U.S. 932 (1952); Sokol Bros. Furniture Co. v. Commissioner, 340 U.S. 952 (1951); United States v. Beal, 340 U.S. 852 (1950) (cited in Robert L. Stern, et al. *Supreme Court Practice* (7th ed. 1993)). The Court also has denied certiorari where the outcome of the case will not change regardless of which statute is applied. *See, e.g.*, Sommerville v. United States, 376 U.S. 909 (1964).

be left without legal recourse if this Court declines to review the ruling below. This Court, therefore, should decline to grant certiorari. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955)(citing Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923)).

V. The Remainder of Plaintiffs' Claims Concern Factual Issues That Were Properly Decided by the District Court and thoroughly Reviewed by the Second Circuit.

Plaintiffs object to the district court judge's grant of summary judgment on three specific issues. Each of the alleged errors concerns purely factual matters, and plaintiffs do not cite any important questions for this Court to review.

First, the district judge correctly dismissed Lambert's and Foster's claims that they were denied equal pay for work on the 360 press as compared to the 385 press. As discussed by the Second Circuit, there was insufficient evidence to present this claim to the

jury. (89a-90a). The Circuit correctly concluded that "plaintiffs proposed no facts that would show that the [360 and 385] positions were substantially equal." (90a).

Second, the district court did not err in dismissing Foster's claim that the Hospital discriminated against her by failing to reassign her to a printing press job immediately upon her return from maternity leave. The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), does not require employers to hold a job open for an employee disabled by pregnancy if the employer does not do so for employees disabled by other conditions. 29 C.F.R. § 1604. Plaintiffs offered no evidence that the Hospital implemented its leave of absence policy in a way that discriminated against women or against Foster. Foster lost no pay or benefits during the few months she worked as a microfilm clerk instead of as a printer.

Finally, plaintiffs offered no evidence that the Hospital discriminated against them on the basis of sex when deciding which Department employees to transfer to various Department positions. The Second Circuit correctly found that "the plaintiffs failed to produce any evidence to support an inference of discriminatory

motive in the assignment of employees to the various printer positions." (91a).

Plaintiffs' reference to St. Mary's Honor Center v. Hicks, -- U.S. --, 113 S. Ct. 2742 (1993) does not transform these three fact-based rulings into a federal question. Plaintiffs seem to be arguing that Hicks holds that a court cannot grant summary judgment in a discrimination case after the plaintiff states a *prima facie* case and the defendant has articulated a legitimate, non-discriminatory reason for its action because the jury is the "appropriate fact finder" (*i.e.*, at the "credibility assessment" stage of the trial). (Pl. Petition at 36-37).

Hicks contains no such holding. The Hicks case did not concern summary judgment, and nowhere in the opinion did this Court hold that summary judgment cannot be granted in a discrimination case. Instead, Hicks specifically held that any presumption of discrimination created by the *prima facie* case is eliminated once the defendant articulates a legitimate, non-discriminatory reason for its actions. Hicks, 113 S. Ct. at 2749. In order to rule in favor of a plaintiff, the trier of fact must

affirmatively find that the true reason for the disputed employment action was discrimination. Hicks at 2749, 2751, 2754. Plaintiffs could not meet this burden as a matter of law on the above facts. Their claims were properly dismissed at summary judgment.

CONCLUSION

For all of the reasons discussed above, this Court should exercise its discretion to deny plaintiffs' petition for a writ of certiorari.

Respectfully submitted,

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